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NO. 94-1015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, INC. solely as Administrator of such defendant plan, and EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, through its members, WILLIAM R. TEGTMAN, NOEL HONOHAN, CHARLES COPLAND, JACK N. MOGUS and ALAN C. GIBSON,

Defendants.

_____/

COMPLAINT

Plaintiff, by and through his undersigned counsel, hereby sues the Defendants as follows:

1. This is an action brought by the Plaintiff to recover benefits due him under the Defendant, EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, and to enforce his rights under the plan.

2. This court has jurisdiction of this cause pursuant to Section 502 (a) (1) (B) of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Section 1132(a) (1) (B).

3. Plaintiff is a vested participant in the Defendant plan by virtue of his employment as a pilot with Eastern Airlines, Inc., (Eastern).

4. The Defendant, EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS (Plan) is an employee pension benefit plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section

1002(2). The plan is administered in Dade County, Florida.

5. EASTERN is being sued herein not in its corporate capacity, but solely as Administrator of EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS (Plan).

6. The Defendant, EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD (Retirement Board) is established for the purpose of aiding the administration of the Plan with regards to the establishment of eligibility and benefits.

7. The Defendants, WILLIAM R. TEGTMAN, NOEL HONOHAN, CHARLES COPLAND and JACK N. MOGUS, are members of the Retirement Board. ALAN C. GIBSON was a member when the acts complained of herein occurred.

8. Plaintiff was an employee of Eastern on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

9. From the date of his injury, and continuing to the present, the Plaintiff's injuries are of such a nature and severity that he is physically unable to continue in

employment with Eastern as a pilot.

10. By virtue of the Plaintiff's employment with Eastern as a pilot, the terms and conditions of the Plaintiff's employment were governed under the terms of a collective bargaining agreement between Eastern and the Airline Pilots Association (ALPA). The collective bargaining agreement provides for Plaintiff's participation in the Defendant Plan. A copy of the agreement is attached hereto as Exhibit "1".

COUNT 1

11. Plaintiff realleges the allegations of Paragraphs 1 through 12 above.

12. On or about June 17, 1986, the Plaintiff notified Eastern of his work related injuries. The Plaintiff was placed off job status due to his injuries effective June 16, 1986.

13. In accordance with Plaintiff's desire to obtain disability retirement, the Plaintiff did, commencing in July 1986 and thereafter request a preliminary application for disability retirement from Eastern. Such forms were completed by Plaintiff and submitted to Eastern

immediately after being received.

14. Plaintiff was terminated on October 17, 1986.

15. On December 10, 1986 Plaintiff was advised by A.H. Luecke, Specialist of Pension Administration, as follows:

> In accordance with the Neutral's decision regarding your termination of employment, the previous termination date of June 17, 1986 was set aside and a revised termination date of October 17, 1986 was established. As a result of this decision, you were considered an active employee on the date you elected to establish as your disability retirement date.

A copy of such letter is attached hereto as Exhibit "2".

16. Accordingly, the only matter to be determined by the Retirement Board was whether or not the nature of the disability warranted a disability retirement pension and Plaintiff did request that such determination be made.

17. The Retirement Board never considered the nature and extent of the Plaintiff's disability, but rather, on June 22, 1987, refused the Plaintiff his disability retirement pension solely on the basis that the Plaintiff was not an employee at the time when he applied for his disability retirement pension. A copy of the Retirement Board's decision dated June 22, 1987 is attached hereto as Exhibit "3".

18. The aforestated decision was contrary to the requirements of law, or not supported by competent evidence, arbitrary and capricious and/or an abuse of discretion in that:

A. It is contrary to the fiduciary's (Eastern) own findings that Plaintiff was an active employee on the date he elected to establish as his disability retirement date (Exhibit "2").

B. It is irrelevant and of no legal consequence with regard to the pivotal question the Retirement Board and Dispute Board was to determine (i.e. the nature and extent of Plaintiff's dismissal).

C. Has no legal basis for the denial of the Retirement

Pension Benefit since at the time of injury Plaintiff was an employee of Eastern and fully vested in the Plan.

D. Contrary to the agreement and plan documents in that such agreement and plan documents do not require application for disability retirement pension prior to termination of employment.

E. Contrary to the agreement and plan documents, since such documents establish the fact that pensions, inclusive of disability retirement pensions, are non forfeitable after vesting.

F. Any failure of the Plaintiff to comply with any condition precedent to obtaining such disability retirement pension was as a result of the failure of the plan administrator to supply forms and information necessary to comply with such condition precedent.

19. Since June 15, 1986 and continuing to date, the Plaintiff has a disability which results in his complete inability to continue with Eastern as a pilot. The decision of the State of New York Worker's Compensation Board establishing the disability as of June 15, 1986, dated December 14, 1989 is attached hereto as Exhibit "4".

20. Plaintiff has met all of the requirements set forth in the plan to receive a disability benefit. The Plan, by and through Eastern and its fiduciaries, Retirement Board and its present and past members, has and continues to deny Plaintiff a disability benefit.

21. Defendant's denial of disability benefits to the Plaintiff is in violation of the provisions of the Plan.

22. Alternatively, the fiduciaries of the plan have interpreted its provisions contrary to the requirements of law or in an arbitrary and capricious manner, and/or abused their discretion in interpreting the terms of the Plan, or its decision is not supported by competent evidence, so as to wrongfully deprive the Plaintiff of a disability benefit.

23. Plaintiff has been required to retain the undersigned attorney in order to recover benefits due him under the Plan and is obligated to pay counsel a reasonable attorneys' fee.

24. Plaintiff has exhausted all remedies under the Plan.

25. All conditions precedent to the filing of this

action have been complied with, waived, excused or would have futile.

WHEREFORE, Plaintiff prays that this court determine the Plaintiff's right to a disability benefit under the Plan, or remand this matter for hearing before the Retirement Board on the issue of the extent and nature of Plaintiff's disability and to retain jurisdiction to review such award to assure that such is consistent with the decision of the State of New York Workers' Compensation Commission Board (Exhibit4) and further award such other relief as the court deems necessary including attorneys' fees and costs.

COUNT II

26. Plaintiff realleges and reaffirms all allegations contained in Paragraphs 1-12 as if set forth herein verbatim.

27. On December 28, 1989, Plaintiff's counsel directed a letter to the Defendant requesting that the Defendant provide certain information and documenta-

tion which the Plaintiff is entitled to receive under the terms of the plan and the provisions of ERISA. A copy of the December 28, 1989 letter is attached hereto as Exhibit "5".

28. Defendant (Eastern) has to date failed and refused to provide all the information and documentation as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

31. As a result of the Defendant's (Eastern) failure to provide the requested information and documentation, Plaintiff has been prejudiced in that he is unaware of his retirement benefits or options.

30. Defendant's (Eastern) failure to provide the information and documentation requested in the December 28, 1989 letter within 30 days is in violation of Section 502 of ERISA, 29 U.S.C. Section 1132.

WHEREFORE, Plaintiff prays that this court enter an order requiring the Defendant to provide the docu-

mentation requested, and further, award the Plaintiff $100.00 per day damages as provided for under ERISA, plus attorneys' fees and costs.

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BY: /s/ NEIL FLAXMAN

NEIL FLAXMAN

FACTS

Daniel Gellert was a pilot with Eastern Airlines, Inc. and participated in Defendant Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots. [1] That plan was administered by Eastern Airlines, Inc. Disputes arising from the Plan were handled by the Pension Dispute Board, established pursuant to the Eastern Airlines Fixed Benefit Retirement Income Plan for pilots, to consider all disputes arising under the interpretation and application of the plan.

The Dispute board is subject to Railway Labor Act regulation and has the authority to affirm or set aside, in whole or in part, the award of the Eastern Benefit Plan. In the alternative, it may remand the proceeding the Plan for further action.

On June 15,1986, Gellert sustained an injury, which the parties agree, occurred within the course of his employment

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1 The Eastern Air Lines Fixed Benefit Retirement Income Plan's history and purpose is reviewed at length in *Vaughter v. Eastern Air Lines, Inc.*, 619 F. Supp. 463 (S.D. Fla. 1985) *aff'd* 817 F.2d 685 (11th Cir. 1987).

and which rendered him incapable of continuing his work as a pilot.

Gellert notified Eastern Airlines of his work related injury on June 17, 1986 and due to his injuries, was removed from "job status" effective June 16, 1986. By July, Gellert completed and submitted to Eastern Airlines his disability retirement forms. He was terminated on October 17, 1986.

In December, 1986, the Pension administrator informed Gellert that the June 17, 1986 termination date was set aside and the revised termination date would be October 17, 1986 (see Exhibit 2 attached to the amended complaint). As a result of that decision to revise the termination date, Gellert would be considered an active employee on the date he elected to retrieve his disability retirement pension.

On June 22, 1987, Gellert's disability retirement pension benefits were denied by the Board based on the Board's finding that Gellert was not an employee at the time he applied for his disability retirement pension. In so finding, the Board effectively found that Gellert was not an employee as of July 1986, completely contrary

to how the Board had otherwise advised Gellert in December of 1986.

Gellert alleges that the Pension Dispute Board's June 22, 1987 ruling was wrong. He seeks to vacate that decision or in the alternative, to remand it for further consideration by the Board claiming he never received a full hearing.

Gellert's amended complaint states that he is suing defendant "Eastern Airlines Pilots Retirement Board [a]s an employee pension benefit plan within the meaning of Section 3(2) of ERISA..." and "Eastern [Airlines] is being sued not in its corporate capacity, but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots."

Standard of Review

Motions to dismiss may not be granted on the basis that the relief prayed for is improper, so long as plaintiffs may be entitled to some relief if they are able to prove their claims. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Since the facts in a motion to dismiss are to be viewed in the light most favorable to the non-movant, [2] these facts are compiled from the Plaintiff's Amended Complaint.

This Court's jurisdiction to review and amend or alter RLA-regulated dispute Board decisions is narrow. Decisions of an adjustment board may be overturned only on the basis of one of the grounds listed in 45 U.S.C. §153 First (q). *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272 (11th Cir. 1982).. [3]

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[2] Facts in a motion to dismiss must be viewed with the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232 (1976).

[3] Those grounds are review to determine I) if an award is irrational; 2) whether the award draws its essence from the letter or purpose of the collective bargaining agreement and; 3) whether the arbitrator conformed to a specific contractual limitation upon his authority. *Loveless*, 681 F.2d at 1275-76 (summarized in *Vaughter v. Eastern Air Lines, Inc.*, 619 F.Supp. 463 at 469 (S.D. Fla.1985) *aff'd* 817F.2d 685 (11th Cir.1987).

Defendants' Eastern Air Lines Fixed Benefit Plans, Eastern Airlines, Corp., and the Pension Dispute board's Motion to Dismiss

The Defendants argue that the Plaintiff's complaint is time barred by the statute of limitation as articulated in the Railway Labor Act (RLA). 45 U.S.C. § 153 First(r). [4] The RLA statute of limitations provides that:

> "All actions at law based on the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Board, and not after."

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[4] The Railway Labor Act was enacted in 1926. In 1936, the provisions of the RLA were extended to air carriers, excluding §153 which is the section providing for dispute boards to hear grievances between labor and management. 45 U.S.C. §181 Section 201. Section 153, entitled "National Railroad Adjustment Board" was excluded from applying to air carriers because "Congress did not want airline labor controversies to go before the railroad board. Instead, it wanted airline labor to create systems boards of adjustment particularly suited for their industry..." *Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352 (7th Cir. 1986).

The Board issued its report on June 22, 1987 and the Plaintiff did not file his complaint until May 9, 1990. If the RLA statute of limitations applies, the claim is time barred because it was filed beyond the two year limitation.

The Plaintiff disputes application of the RLA's two-year statute of limitations and maintains that the complaint should be governed by ERISA's three-year statute of limitation. His argument is based on the language of the complaint which he states is clearly brought against Eastern Airlines Pilots Retirement Board and Eastern Airlines, Inc. as the administrator of the Retirement Plan, pursuant to ERISA. The ERISA statute of limitations states:

> "No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of...(2) three years after the earliest date (A) on which the

> plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could resaonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title...." ERISA, 29 U.S.C. §1132 (a) (2).

Should this statute of limitation apply, the plaintiff's complaint is timely.

Additionally, the defendants argue that the Plaintiff's claim, challenging the meaning of the Dispute Board's review of his claim, has the equivalent effect of calling for an interpretation of the terms of the plan and therefore, takes the claim outside the scope of ERISA.

Analysis

Eastern Airlines Pension Dispute Board was created by a collective bargaining agreement within the

meaning of 45 U.S.C. §184.[5] By its own terms, it is subject to all provisions of the RLA. The defendant claims that this coverage includes application of the statute of limitations. To apply the ERISA statute of limitations would serve to alter, or even supersede, the RLA's pro-

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[5] The amended complaint recites §11.2 of the Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots which provides:

> All disputes concerning the application, interpretation or administration of the Plan in respect to individual employees and their participation in or their benefits under the Plan shall be heard and determined by the Pension Dispute Board as the appropriate named fiduciary in accordance with Section 503(2) of ERISA. Said Pension Dispute Board is the appropriate adjustment board under Section 204 of the Railway Labor Act for the determination of all such disputes.

Section 503(2) of ERISA, 29 U.S.C. §1133(2) provides, "...every employee benefit plan shall..(b) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." All board decisions are final and binding on both parties to the dispute. *Vaughter v. Eastern Airlines, Inc.*, 619 F. Supp. 463 (S.D. Fla. 1985) *aff'd*817 F.2d 685 (11th Cir. 1987).

visions and would be contrary to legislative intent.[6]

The complaint, however, states that the action against Eastern Airlines, Inc. and the Board's directors is based on a breach of fiduciary duty, thereby making it unnecessary for this Court to address the issue of whether ERISA preempts the RLA. Limitations on actions by employees brought only against their union for breach of the duty of fair representation do not fall under the provisions of 45 U.S.C. §153(First)(r) of the Railway Labor Act, as that section, by its own terms, applies only to disputes between an employee or group of employees and a carrier or carriers. *Ranieri v. United Transportation Union,* 743 F.2d 598 (7th Cir. 1984) citing to *Conley v. Gibson*, 355 U.S. 41, 44 (1957).

Claims of fiduciary violations under ERISA are statutory claims that are independent from a suit seeking judicial review of the coverage under the pension plan. *Bonin v. American Airlines, Inc.*, 621 F.2d 635 (5th Cir. 1980).

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[6] Section 514(d), 29 U.S.C. 1144(d) states: "Nothing in this subchapter shall be construed to alter, amend, modify, impair, or supersede any law of the United States [except where specifically provided] or any rule or regulation entered under any such law."

Here, the plaintiff's complaint states that the dispute is strictly against the named defendant's in their fiduciary capacity. That being the case, then the ERISA statute of limitations would apply and the claim would not time-barred.

However, the Defendant's second argument brings to light the validity of naming Count I a Claim for Breach of Fiduciary Duty. The gravamen of Count I is that the hearing was insufficient or that the Dispute Board was incorrect in their findings. Though the claim simply opposes the Dispute Board's findings, the Plaintiff has clothed as breach of fiduciary duties. Simply recharacterizing a claim does not make it any less a dispute of the Board's findings and thus, is insufficient to evade application of the RLA. *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972).

In *Andrews*, a former railroad employee was discharged following an accident which rendered him physically unable to work. The Defendant Railroad argued that the Plaintiff's remedy was to be found within the RLA governed

labor dispute board. By not taking his claim before the dispute board for arbitration, he had failed to exhaust his administrative remedy and his claim merited dismissal. The Plaintiff sued the railroad alleging wrongful discharge and sought recovery of damages for loss of past and future income, and for attorney's fees. He argued that his claim fell outside of the RLA arbitration regulations because he was suing for wrongful discharge after he was severed, as an employee, from the Railroad.

Unconvinced, the Supreme Court explained that the employee's decision to sever his connection with the railroad in an attempt to have his claim treated as a breach of employment contract was not sufficient to render different treatment from normal disputes over the interpretation of a collective-bargaining agreement. *Id* at 323. Similarly here, the Plaintiff has brought his case as a breach of fiduciary duty claim, rather than a claim disputing the Board's decision. However, it is no different than if he outright challenged the review board's

decision without the breach of fiduciary claim. Furthermore, nothing in the claim sets it apart as a breach of fiduciary duty and as such, the case is governed by Section 11.2 of the Plan.[7]

Wherefore, the Defendants' motion to dismiss Count I is granted.

Defendants Mogus and Copeland's Motion to Dismiss

Any action against the members of a RLA dispute board must be dismissed since members of dispute boards may not be held personally answerable for their action in resolving disputes that come before the Board. Radin v. United States, 699 F.2d 681 (4th Cir. 1983); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 159 (2nd Cir. 1979), *cert denied*, 449 U.S. 854 (1980) *reh'g denied* 449 U.S. 1026 (1980). That is true even if the action is governed by ERISA. *International Union, United Auto., etc. v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983) (duties and liabilities arising under ERISA are not enforceable against an arbitrator who acts in his official capacity). Therefore, any claims against Defendants Mogus and

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[7] See note 5.

Copeland cannot survive. The motion to dismiss Count I is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of September, 1991.

s/s FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE
FEDERICO A. MORENO

copies provided:

Neil Flaxman, Esq.
Maurice J. Baumgarten,Esq.
Robert T. Kofman, Esq.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI FLORIDA

Case No. 90-1113-CIV-MORENO

DANIEL G. GELLERT,
Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, INC. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIRLINE PILOT ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIVSON, WILLIAM R. TEGTMAN, JACK N. MOGUS CHARLES COPELAND, and the TRAVELERS INSURANCE CORPORATION.
Defendants.

_____/

Felice Busto, Esq.

FIRST AMENDED COMPLAINT

NATURE OF THE ACTION

1. Plaintiff Daniel Gonzales Gellert ("Gellert") brings this action for damages, compensatory and punitive, under the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. ## 1961 et seq. ("RICO"), the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. Sections 1132 (a) (1) (B); 502 (a) (1) (B); 510 #1140, 511 #1141; 403 (c) (1) #1103 (c) (1); 404 (a) (1) (A); 1104 (a) (1) (A); 406 (a) (1) and (b) #1106 (a) (1) (b); Section 1983 as secured by the Constitution and Laws of the United States for injury under the color of law, due process rights and under the statutory and common law of the State of Florida, and under the appropriate laws of Workers' Compensation Board.

PARTIES

2. Plaintiff is a vested participant in the Defendant plan by virtue of his employment as a pilot with Eastern Airlines, Inc. ("EASTERN"), a resident of Florida, and illegal acts that are subject of this Complaint oc-

curred and are occurring in this district.

3. The Defendant, Eastern Airlines Fixed Benefit Retirement Income Plan For Pilots ("Plan") is an employee pension benefit plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section 1002(2). The Plan is administered in Dade County, Florida.

4. Eastern is being sued herein not in its corporate capacity but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan For Pilots, (Plan).

5. Defendant, Eastern Airlines Pilots Retirement Board, a/k/a Pension Dispute Board (Retirement Board) is established for the purpose of aiding the administration of the Plan with regards to the establishment of a eligibility and benefits based solely upon the strict language of the Plan as a fiduciary.

6. Defendant Pension Benefit Guaranty Corporation ("PBGC") is trustee of the Plan as authorized under Section 4042(c) of ERISA, 29 U.S.C. # 1342(c) and as such has the obligation to pay from available assets Plaintiff's liability for the disability benefit pen-

sion which became due prior to the termination of the Plan on October 4, 1990, under Section 4044(a) of ERISA, 29 U.S.C. # 1344(a) ; 29 CFR # 2618.3.

7. Defendant Airline Pilots Association, International ("ALPA") is an unincorporated labor organization with its principal office in Washington, D.C. and represented the Eastern pilots pursuant to certification issued by the National Mediation Board, and has an office in this jurisdiction, and by law had a duty of fair representation liability to the Plaintiff as to rights arising from employment and retirement under the ERISA Plan.

8. Defendant Travelers Insurance Corporation is an agent and carrier of insurance for Defendant Eastern as to Workers' Compensation Board occupational injury, and as to employee medical coverage of employed, disabled and retired Eastern pilots.

9. Defendant Alan C. Gibson is an official, a corporate officer of Eastern, the responsible official who attempted to discharge the Plaintiff from his Eastern pilot employment, and as a fiduciary under ERISA was the

Chairman of Defendant Pension Dispute Board recorded in an unlawful conflict of interest.

10. Defendant William R. Tegtman is an official of Defendant Eastern and a member of the Pension Dispute Board.

11. Defendant Charles H. Copeland is a union official of ALPA, member of Council 51 LEC, Chairman of the Master Executive Council, the highest ALPA official on Eastern, also a member of the Pension Dispute Board, a fiduciary position, and participant in the plan, resides in Setawket, New York.

12. Defendant Jack N. Mogus is a member of the ALPA Council 79 Local Executive Council ("LEC") and a member of the Eastern Master Executive Council ("MEC"), a member of the Pension Dispute Board ("PDB") and resides in Vienna, Virginia.

JURISDICTION AND VENUE

13. This Court has jurisdiction of this action under 18 U.S.C. # 1965(a) (RICO) 28 U.S.C. ## 1331 (federal question); and by 28 U.S.C. ## 1337 as under

an act regulating commerce; ERISA; and Section 1983 as secured by the Constitution and Laws of the United States for injury suffered under the color of law; and general principles of pendent jurisdiction.

14. Venue is proper in this District pursuant to 18 U.S.C. # 1964(a) and (b), and 28 U.S.C. 1391. Defendants do business in this District and illegal acts complained of occurred and are occurring in this District, and defendants reside, are found, have agents, or transact their affairs in this District.

15. Plaintiff's damages in this Complaint are over the established legal limit, and this Complaint is for $3,000,000.00 in compensatory damages.

FACTUAL BACKGROUND

16. Plaintiff was an employee of Eastern on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

17. Plaintiff was assigned as Captain of Eastern flight 909, and L-1011 aircraft departing Miami, Florida, and unairworthy aircraft in which the Plaintiff had to land some 15 tons above the maximum allowable struc-

tural weight with some three hundred passengers, made a second takeoff, forcing the Plaintiff to discharge (dump) in flight some 5,000 gallons of jet fuel to made a second emergency landing in Miami,. Florida.

18. Plaintiff was injured while moving on ladder to inspect his unairworthy aircraft.

19. Plaintiff was not aware, a matter which has been fully adjudicated and is documented in PLEA AGREEMENT 90 CR 629 (ILG) in the United States District Court Eastern District of New York, in which Eastern Airlines, Inc. pleaded guilty to defrauding the United states and the passengers of Eastern, as through the operation of unairworthy aircraft and the falsification of required documents.

20. Plaintiff in his Eastern employment as of February 11, 1963 has been an outstanding pilot employee, highly responsible, professional and providing safe flight operations to his passengers.

21. From the date of his injury on June 15, 1986, and continuing to present, Plaintiff's injury has been determined by the Eastern Medical Department, the Florida

Knee Center, the Mayo Clinic, the Workers' Compensation Board, Eastern and its insurance carrier Travelers Insurance Company to be of such nature and severity that he is and has been unable to continue his employment with Eastern as a pilot, employment which requires the carrying of some 60 pounds between aircraft assignments at a rapid pace.

22. Plaintiff's disability has been deemed as permanent by stipulation before the Workers' Compensation Board.

23. During the period material to this action, defendants Eastern and ALPA their agents, employees and officers were locked in a bitter fight for the control of Eastern, the loyalty and support of the Eastern employees, rising to a well documented violation of RICO, resulting in criminal charges against Eastern by the United States.

24. During the period material to this action, ALPA had the duty of fair representation ("DFR") of all Eastern pilots under federal law, The Railway Labor Act ("RLA") as an exclusive bargaining agent, (45 U.S.C.

#152).

COUNT I

25. Plaintiff realleges the allegations of paragraphs 1 through 24 above.

26. Defendant ALPA breached its duty of fair representation of Plaintiff's ERISA and Plan rights to the disability benefit pension resulting from his occupational accident on June 15, 1986.

27. Plaintiff's rights are final and binding due to the December 18,1987 Eastern Airlines Medical Department Examination under Section 3.6 (d) (ii) of the Plan, **(EXHIBIT1)**, and the followup examinations by the same and exact medical doctor on February 11, 1991 **(EXHIBIT 2)**, March 26, 1991 **(EXHIBIT 3)**, Independent Medical Examiner ("IME") by Mayo Clinic on December 18, 1986, February 28, 1991 **(EXHIBIT 4)** , January 22, 1992 **(EXHIBIT 5)**, The Florida Knee Clinic dated February 14, 1991 **(EXHIBIT 6)**, and the Workers' Compensation Board decisions awarding the maximum ambulatory compensation award.

COUNT II

28. Plaintiff realleges the allegations of paragraph 1 through 27 above.

29. Defendants ALPA, Copeland, Gibson, Mogus, Tegtman with others conspired to defraud the Plaintiff of ERISA, Plan and other employee benefits due and payable as of the onset of the occupational injury disability on June 15, 1986.

30. Defendants as a matter of conspiracy made false material representations for the purpose to defraud Plaintiff, refused to apply the same standard in providing the ERISA Plan benefits as they have to others, including but not limited to Jack N. Mogus, Robert Shipner.

COUNT III

31. Plaintiff realleges the allegaations of Paragraphs 1 through 30 above.

32. Defendant PBGC as a matter of conspiracy with the other Defendants has breached its duty under ERISA to provide the Plaintiff's disability benefit pension based upon fiction, refused to abide by the final and binding decision by the Easstern Medical Department under Section 3.6 of the Plan on December 18,

1987. The PBGC continues to make new and unreasonable demands on the Plaintiff, refuses to submit this matter to the Eastern Medical Department or to selected Independent Medical Examiners under the Plan, refused this disability benefit pension by stating that one of the PBGC's non medical clerks could over turn medical reports based upon medical examinations by competent and universally recognized medical authorities.

COUNT IV

33. Plaintiff realleges the allegations of Paragraphs 1 through 32 above.

34. Defendants in a conspiracy to defraud the Plaintiff of ERISA, Plan and other earned employee benefits in a clear and intentional violation of ERISA Section 510 # 1140 discharged Plaintiff's employment on June 17, 1986 for the purpose of interfering with the attainment to the disability benefit pension, to which he became entitled to on June 15, 1986.

COUNT V

35. Plaintiff realleges the allegations of Paragraphs 1 through 34 above.

36. Defendants used fraud in violation of ERISA Section 511 #1141 to defraud the Plaintiff of vested and earned ERISA Plan benefits, continue to retrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

COUNT VI

37. Plaintiff realleges the allegations of Paragraph 1 through 36 above.

38. Defendants in an intentional violation of Section 1983 injured the Plaintiff under the color of law, through treatment different then others, claiming rights under the RLA, ERISA, the Plan, Workers' Compensation Board Law, the PBGC internal procedures, DFR, due process, arbitration, court procedures and have refused earned benefits to cause the Plaintiff followng his disability injury on June 15, 1986.

46. Defendant PBGC has ruled in Plaintiff's favor, but the PBGC has then joined the ongoing conspiracy to defraud the Plaintiff based upon the violation of ERISA Sections 510 and 511, based upon a subsequent discharge of employment some four months after the onset of the disability injury on June 15, 1986, and the Defendant's unlawful argument in fraud, as an intentional violation of Section 510 based upon the claimed right to discharge the Plaintiff on October 17, 1986 for the purpose of interfering with the attainment to the ERISA Plan disability benefit pension.

COUNT IX

47. Plaintiff realleges the allegations of Paragraphs 1 through 46 above.

48. Defendants have not provided Plaintiff all the information and documentation as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

49. Defendants have since December 1984 to

(a) judgment granting the disability benefit pen sion;

(b) payment of legal fees as authorized under ERISA

(c) legal representation by ALPA under the duty of fair representation;

(d) an award to Plaintiff Gellert of such damages as it shall prove at trial in an amount not less than $3,000.000.00, trebled as mandated by 18 U.S.C. #1964(c) and Florida Statute # 772.104;

(e) an award of punitive damages to Plaintiff Gellert in an amount no less than 5 million dollars;

(f) an award to Plaintiff for the cost of this action, together with attorney fees pursuant to RICO;

(g) award $100.00 per day from January 1985 to date of judgment for violation of 502 ERISA 29 U.S.C. # 1132.

(h) an award to Plaintiff both pre-judgment and post-judgment interest on their actual damages, at the highest interest rate per mitted by law;

(i) an award to Plaintiff any such different or further relief this Court may deem just and proper.

PLAINTIFF DEMAND THAT THIS ACTION BE TRIED BEFORE A JURY.

January 25, 1992

s/s DANIEL GONZALES GELLERT pro se.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS et al.,

Defendants.

_____/

THIS CAUSE came before the Court sua sponte. By Order dated January 10, 1992, this Court granted Plaintiff's Motion to Amend his Complaint. Plaintiff's Amended Complaint was filed on January 25, 1992. A

review of the Amended Complaint reveals that Plaintiff has included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion of September 6, 1992. Therefore, it is

ADJUDGED that the Plaintiff's Amended Complaint is STRICKEN. Plaintiff is granted Leave to file a Second Amended Complaint within 20 days of this Order. The Second Amended Complaint **SHALL NOT** include reference to any Counts or any Defendants previously dismissed by Order of this Court.

DONE AND ORDERED in chambers at Miami, Florida, this 13th day of February, 1992.

s/s FEDERICO A. MORENO

UNITED STATES DISTRICT JUDGE

copies provided:
Daniel G. Gellert
Maurice J. Baumgarten, Esq.
Karen L. Morris, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, Inc. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND AND THE TRAVELERS INSURANCE CORPORATION,

Defendants.

_____/

THIRD AMENDED COMPLAINT

NATURE OF ACTION

1. Plaintiff, Daniel Gonzales Gellert, ("Gellert")

inflict permanent and severe emotional distress.

E. Defendants used the ERISA Plan in an unlawful manner in violation of RICO in denying ERISA Plan benefits to enforce the RLA Eleventh, "union security" provisions as to the forced collection of union dues.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action under 18 U.S.C. # 1965(a) (RICO) 28 U.S.C. ## 1331 (federal question); and by 28 U.S.C. ## 1337 as under an act regulating commerce; 29 U.S.C. # 1101 ERISA; 45 U.S.C. # 151 RLA;and 42 U.S.C. 1983 as secured by the Constitution and Laws of the United States for injury suffered under the "color of law" and due process; and general principles of pendent jurisdiction and rights under the Seventh Amendment.

3. Venue is proper in this District pursuant to 18 U.S.C. # 1965(a) and (b), and 28 U.S.C. 1391. Defendants

do business in this District and illegal acts complained of occurred and are occurring in this District, and defendants reside, are found, have agents, or transact their affairs in this District.

4. Plaintiff's damages in this Complaint are over the established legal limit, as this Complaint is for $3,000,000.00 in compensatory damages.

STATUE OF LIMITATIONS

5. Plaintiff's complaint as to Defendant ALPA's breach of duty of fair representation was on or about January 27, 1992.

6. Plaintiff's denial of ERISA and Plan benefit disability pension was denied by Defendant PBGC on or about June 12, 1991.

7. Plaintiff was notified on or about October 9, 1991 that Defendant Alan C. Gibson, ("Gibson") discharged Plaintiff's employment during 1986, then denied his ERISA

rights as a fiduciary and Chairman of the Pension Dispute Board, ("PDB").

PARTIES

8. Plaintiff is a vested participant in the Defendant Plan by virtue of his employment as a pilot with Eastern Airlines, Inc., ("Eastern"), a resident of Florida, and the illegal acts that are the subject of this Complaint occurred and are occurring in this District.

9. Defendant Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots ("Plan"), is an employee benefit Plan within the meaning of Section 3(2) of ERISA, 29 U.S.C. Section 1002(2). The Plan is administered in Dade County, Florida.

10. Eastern is being sued herein not in its corporate capacity but solely as Administrator of Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots, ("Plan").

11. Defendant Eastern Airlines Pilots Retirement

Board, a/k/a Pension Dispute Board, ("PDB") is established for the purpose of aiding the administration of the Plan with regards to the establishment of eligibility and benefits based solely upon the strict language of the Plan as fiduciary.

12. Defendant Pension Benefit Guaranty Corporation, ("PBGC"), is trustee of the plan as authorized under Section 4042(c) ERISA, 29 U.S.C. 1342(c) and as such has the obligation to pay from available assets Plaintiff's liability for the disability benefit pension which became due prior to the termination of the Plan on October 4, 1990, under Section 4044(a) of ERISA, 29 U.S.C. # 1344(a); 29 CFR # 2618.3.

13. Defendant Air Line Pilots Association, International ("ALPA") is an unincorporated labor organization with its principal office in Washington, D.C. and represented the Eastern pilots pursuant to certification issued by the National Mediation Board, and has an office in this jurisdic-

brings this action for damages, compensatory and punitive, under the Racketeering Influence and Corruption Organization Act, ("RICO"), 18 U.S.C. # # 1961 et seq, the Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. 1101 et seq, the Railway Labor Act, ("RLA"), 45 U.S.C. #151 et seq, 42 U.S.C. Section 1983 et seq, as secured by the Constitution and laws of the United States for injury under color of law, due process, civil rights, access to court and jury trial, and under the statutory and common laws of the State of Florida and under the appropriate laws of the Workers' Compensation board laws covering Plaintiff's rights.

A. Plaintiff's rights under ERISA and the Eastern Airlines Fixed Benefit Retirement Plan for Pilots, ("Plan"), was denied by Defendant Pension Benefit Guaranty Corporation, ("PBGC"), on June 12, 1991.

B. Plaintiff has been denied any access to Plan

funds as of Plaintiff's disability injury dated June 15, 1986, as a matter of fraud, conspiracy in violation of Sections 510 and 511 of ERISA, 1140 and 1141, through the commission of bribery, extortion, mail and wire fraud, breaches of known legal duties, based upon more than two predicate crimes, in an existing enterprise, as a pattern of racketeering activity within a ten year period of time, in violation of RICO.

C. Defendants and their attorneys in violation of Section 511 ERISA conspired to defraud the Plaintiff in violation of Section 1983 when under the color of law made material misrepresentations in Court to injure the Plaintiff and deny his rights under the Constitution law and civil rights.

D. Defendants interfered with Plaintiff's Plan and contractual rights, employment rights, defamed, injured and in other means harmed him, his property, his person to

tion, and by law had a duty of fair representation liability to the Plaintiff as to rights arising from employment and retirement under ERISA and the Plan.

14. Defendant Travelers Insurance Corporation is an agent and carrier of insurance for Defendant Eastern as to Workers' Compensation Board occupational injury, and as to medical coverage of employees, retired and disabled former employee pilots.

15. Defendant Alan C. Gibson is an official, a corporate officer of Eastern, the responsible official who attempted to discharge the Plaintiff from his Eastern employment, and as a fiduciary under ERISA was the Chairman of the Defendant Pension Dispute Board documented in an unlawful conflict of interest in this cause.

16. Defendant William R. Tegtman is an official of Defendant Eastern and a member of Defendant Pension Dispute Board.

17A. Defendant Jack N. Mogus is an ALPA official member of the Master and Local Executive Council, a Plan participant and a member of the Pension Dispute Board.

17B. Defendant Charles H. Copeland is an ALPA official as the Chairman of the Master Executive Council, a Plan participant and a member of the Pension Dispute Board.

PREDICATE CRIMES

18. Within, and in the all in compassing past ten years from this date, Defendants were an enterprise engaged in a pattern of racketeering which injured Plaintiff.

19. Defendant ALPA in violation of RICO, in an unlawful conspiracy, confederation and combination, by design defrauded Plaintiff through the forced collection of non required payments of money which was used by ALPA for other then the administration or negotiation of an agreement.

20. ALPA and the other Defendants in this con-

spiracy knew, had personal and legal knowledge that this action was an economic crime of extortion to compel payment which was not owed, or in any other lawful means required to be paid by the Plaintiff.

21. Defendant ALPA in a conspiracy with the others Copeland, Mogus, Tegtman, Gibson, the Plan Administrator as a matter of retaliation for refusal to meet Defendants' extortion demands, denied and in other means taken away Plaintiffs' money under the ERISA Plan, in violation of Section 511, a criminal statute.

22. Defendants unlawfully bribed a neutral hired by Plaintiff, asked to become Defendants' employee in giving opinion which would and did hold Plaintiff's discharge from his Eastern employment for money which was paid and received by the neutral unlawfully from Defendants.

23. Defendants used this decision to defraud Plaintiff.

24. Defendants, William T. Tegtman, ("Tegtman"), Charles Copeland, ("Copeland"), Jack N. Mogus, ("Mogus") and Gibson breached their know legal duties though omission, concealment and fraud failed to disclose to Plaintiff that the PDB Chairman Gibson was the Eastern official who discharged and approved the Plaintiff's termination of his Eastern employment on June 17, 1986. This act was the result of an unlawful conspiracy to defraud the Plaintiff of ERISA Plan benefits, and Defendants did defraud Plaintiff in violation of ERISA 510 and 511, under Section 1983, the color of law, violating RICO.

25. Defendants' agents Gary Green, Felice Busto and Robert Kofman had personal knowledge that Copeland and Mogus were officials of defendant ALPA, participants of the instant Plan, and that Mogus while denying Plaintiff his retirement under the Plan, received his benefit retirement as a bribe.

26. Defendants under the color of law claimed privilege as arbitrators, arbital immunity, under the color of law and in the furtherance of the unlawful violation of RICO have to date continued as a group of individuals associated together for a common purpose of engaging in a course of conduct with an ongoing organization and with various associates functioning as a continuing unit, associated in fact, which has to date resulted in fraud and other unlawful activity through the use of interstate mail and wire, have hurt, injured and defrauded the Plaintiff or earned and vested rights, large sums of money, injured him in his person and property.

27. Defendant PBGC, through its official Robert Joy informed Plaintiff during October 1990 to take less money from the Plan because the PBGC will play around with his ERISA Plan benefit for two years, and then refuse his money as a matter of policy.

28. To date, the last sixteen months, Defendant carried out this threat and Plaintiff has not received any money from his benefit Plan, while Defendant Mogus filed later then the Plaintiff has received his benefit pension for years as through the unlawful bribe.

29. Defendants have committed felony crime, to which Eastern and others have plead guilty, a matter just noticed to Plaintiff, as documented in the Untied States District Court Eastern District of New York, Case No. 90 CR 629 (ILG) dated February 1991, which is conviction for conspiracy to defraud the United States by impeding and impairing the lawful functions of the FAA, in violation of 18 U.S.C. Sections 371, 1001.

30. Plaintiff refused to join and in any other means to assist, engage or participate in the criminal activity of the defendants on June 15, 1986, and refused to make a third take off in an unairworthy L-1011 aircraft in the fur-

therance of the Defendants on going criminal enterprise.

31. Defendants retaliated and denied Plaintiff's ERISA Plan rights immediately following Plaintiff's lawful actions, in fact making him a victim under RICO, and Defendants are engaged in an on going conspiracy to defraud him through an alleged discharge by Gibson on June 17, 1986.

FACTUAL BACKGROUND

32. Plaintiff realleges the allegations of Paragraphs 1 through 31 above.

33. Plaintiff was an employee of Eastern Airlines, Inc. on June 15, 1986 when he was injured within the course and scope of his employment as a pilot.

34. Plaintiff was assigned as Captain of Eastern flight 909, an L-1011 aircraft department Miami, Florida, an unairworthy aircraft in which the plaintiff had to land some 15 tons above the maximum allowable structural weight with

some three hundred passengers, made a second takeoff, forcing Plaintiff to discharge (dump) in flight some 5,000 gallons of jet fuel and make a second emergency landing in Miami, Florida.

35. Plaintiff was injured while moving on ladder to inspect his unairworthy aircraft.

36. Plaintiff in his Eastern employment as of February 11, 1963 has been an outstanding pilot employee, highly responsible, professional and providing safe operations to his passengers.

37. From the date of his injury on June 15, 1986, and continuing to present, Plaintiff's injury has been determined by the Eastern Medical Department, the Florida Kree Center, the Mayo Clinic, the Workers' Compensation Board, Eastern and its insurance carrier the Travelers Insurance Company to be unable to continue his employment with Eastern as a pilot, employment which required the carrying

of some 60 pounds between aircraft assignments as a rapid pace some distance.

38. The Court in this action has established the following facts, which are prima facie, and are provided to prove the Plaintiff's case:

> "On June 15, 1986, Gellert sustained an injury, which the parties agree, occurred within the course of his employment and which rendered him incapable of continuing his work as a pilot. Gellert notified Eastern Airlines of his work related injury on June 17, 1986 and due to his injuries, was removed from "job status" effective June 16, 1986. By July, Gellert completed and submitted to Eastern Airlines his disability retirement forms. He was terminated on October 17, 1986." (See: ORDER GRANTING MOTION TO DISMISS COUNT I. pages 2 & 3).

39. Plaintiff's disability has been deemed permanent in stipulation before the Workers' Compensation Board by Defendants Eastern and Travelers Insurance Company ("Travelers").

40. During the period material to this action,

Defendants Eastern, ALPA, their officers, employees, agents were locked in a bitter fight for the control of Eastern, the loyalty and support of the Eastern employees, rising to documented violations or RICO, resulting in criminal charges against Eastern and others by the United States.

41. During the period material to this complaint, ALPA had the duty of fair representation ("DFR"), of all Eastern pilots under federal law, The Railway Labor Act, ("RLA"), as an exclusive bargaining agent, 45 U.S.C. # 152.

42. Travelers has failed and refused to provide employee health benefit coverage to plaintiff and his dependents, as a matter of conspiracy to harm and injure him.

43. ALPA has denied Plaintiff's First Amendment rights through the forced payment to support ALPA's publicity.

44. ALPA unlawfully required non ALPA pilots

to pay union dues which were used by ALPA for activities other then the negotiating and administering the contract.

45. ALPA used these forced funds to advertise, promote ALPA policy, and in all other means promote its self interest in matters to which non ALPA pilots were firmly opposed under the First Amendment and free speech.

46. ALPA knew of should have known that the extraction of dues beyond the amount required to pay for the negotiation and administration of the contract was used for forcing ideological conformity and other actions in contravention of the First Amendment and violated Plaintiff's Fifth Amendment.

47. ALPA has unlawfully, in a conspiracy with the other Defendants moved the enforcement of the union security clause of compulsory union membership and the forced collection of union dues under Section 2(11) of the RLA to include the unlawful denial of ERISA Plan benefits

in violation of Section 510, in the discharge of the Plaintiff to interfere with the attainment of the disability benefit pension, to which he became eligible as an Eastern pilot employee on June 15, 1986.

48. ALPA through its officers Copeland and Mogus conspired with other Defendants in violation of ERISA Section 511 # 1141 to defraud the Plaintiff of earned and vested ERISA Plan benefits, continue to restrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

49. Plaintiff received by U.S. Mail **(Exhibit 1)**, letter dated May 1, 1985, to which Plaintiff returned **(EXHIBIT 2)**, dated June 1, 1985 authorizing union dues deduction.

50. Plaintiff, again returned authorization for the deduction of union dues, **(Exhibit 3)**, received **(Exhibit 4)** applied for membership **(Exhibit 5)**, this matter was con-

ducted through interstate commerce, mislead the Plaintiff, while Plaintiff was attempting to become a member as to ALPA's instruction, ALPA requested Plaintiff's discharge.

51. Plaintiff paid the union dues in question, they were accepted by ALPA and to date kept.

52. To date ALPA has not granted Plaintiff membership and contravened RLA Eleventh (a) since membership to Plaintiff was not available upon the same terms and conditions as were generally applicable to any other member.

53. Defendants contravened RLA Eleventh (b) through the refusal to deduct union dues following Plaintiff's submission of authorization of union dues deductions.

54. ALPA breached its duty through the failure to defend Plaintiff's rights in this matter after ALPA decided to accept the payment of union dues. At that point, any further controversy was solely between Defendants Eastern and ALPA under law.

55. Defendants in violation of Section 1983 only discharged Plaintiff and reinstated all other pilots in the same and similar situation.

56. Defendant ALPA was using forced contract maintenance fee's for legal and professional fees, strike support as to Continental Airlines, strike benefits, flight attendant, communications as to United Airlines, non of these were authorized by Plaintiff as a non ALPA member, Defendants' forced collection of funds for these activities are unlawful, and constituted an economic crime of extortion for which ALPA had the Plaintiff loose his employment and retirement under the ERISA law and the Plan. **(Exhibit 6)**.

57. Plaintiff's employment with Eastern Airlines, Inc. was governed by federal regulations, in interstate and international flight operations, from at least July 24, 1985, as L-1011, A-300 and B-757 Captain.

58. At least of July 24, 1985, Defendants were

involved in criminal activity of conspiracy and fraud, felony crimes to which Eastern plead guilty of felony violations Title 18. U.S.C. Sections 371 and 1551, et seq.: did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud the United States, (Count I); falsify and conceal; (Count VII) falsify and conceal; (Count XVI), falsify and conceal; (Count XXII), falsify and conceal; (Count XXV), falsify and conceal; (Count XXXVI), in violation of Sections 1001, 3623 and 2. See: Plea Agreement 90 CR 629 (ILG) United States District Court Eastern District of New York, United States against Eastern Air Lines, Inc. February 1991.

59. Plaintiff is a victim of the crimes described above.

60. Plaintiff's ERISA and Plan rights were guaranteed as of his occupational disability date on June 15, 1986 by the Plan's Section 13.6, in that the status of a Pilot is

changed that he no longer is a Pilot, the Pension and other benefit he is entitled to under the Plan shall remain payable in accordance with the terms and conditions of this Plan, and Defendants conspired to deny this provision of the Plan through the efforts of Gibson, Mogus, Tegtman, Copeland, and others did knowingly and intentionally falsify, scheme and device a material fact to defraud Plaintiff of Plan provisions granting the disability benefit pension, breaching known legal duty in violation of Section 1983, under the color of law, in violation of RICO.

61. Defendant ALPA has paid for attorneys to continue Defendants unlawful actions to defraud Plaintiff of his vested ERISA Plan benefits, and to use this case to force other non ALPA pilots to pay contract maintenance fees, beyond those funds required to cover the negotiations and administration of the contract.

62. Defendant ALPA breached its duty of fair

representation of Plaintiff's rights under the Plan, to continue its economic crime of extorting large sums running into millions of dollars, and breached its known legal duty.

63. Defendants refused to rehire Plaintiff on the orders of Defendant Gibson, and violated Section 1983 and Plaintiff's civil rights based upon discrimination.

64. Plaintiff realleges the allegations of Paragraph 1 through 42 above.

65. Defendants have denied, taken away, and to date have refused to release any funds from the Defendant Plan, in violation of ERISA and the terms of the Plan.

66. Plaintiff's rights are final and binding due to the December 18, 1987 Eastern Airlines Medical Department report based upon a medical examination under Section 3.6(d) (ii) of the Plan, **(Exhibit 7)**, and the follow up examination by the same and exact medical doctor on February 11, 1991, **(Exhibit 8)**, March 26, 1991 **(Exhibit 9)**, Inde-

pendent Medical Examiner ("IME"), by the Mayo Clinic on December 18, 1986, February 28, 1991 **(Exhibit 10)**, January 22, 1992 **(Exhibit 11)**, The Florida Knee Clinic dated February 14, 1991 **(Exhibit 12)**, and the Workers' Compensation decisions awarding the maximum ambulatory award.

67. Section 13.6 (b) protects Plaintiff's ERISA and Plan rights, Defendants violated ERISA in an unlawful and illegal act to pocket, take away and assign to others Plaintiff's vested and earned pension benefits.

68. Plaintiff has met all the provision of the Plan, provided medical documents beyond those required by the Plan, at his own expense.

COUNT II

69. Plaintiff realleges the allegations of Paragraphs 1 through 46 above.

70. Defendant PBGC as a matter of conspiracy with the other Defendants has breached its duty under

ERISA to provide Plaintiff his disability benefit pension, refused to abide by the December 18, 1987 Eastern Medical Department's final and binding medical examination under Section 3.6 of the Plan.

71. The PBGC continues to make new and unreasonable demands on Plaintiff, refuses to submit this matter to the Eastern Medical Department or to select an Independent Medical Examiner under the Plan, refused the disability benefit pension through fraud in claiming that Robert Joy, a non medically trained clerk could turn over medical reports based upon medical examinations by competent and universally recognized authorities.

COUNT III

72. Plaintiff realleges the allegations of Paragraphs 1 through 49 above.

73. Defendants ALPA, Gibson, Tegtman, Copeland, Mogus with others conspired to defraud Plaintiff of

ERISA, Plan and other employee benefits due and payable as of the onset of occupational injury disability on June 15, 1986.

74. Defendants as a matter of conspiracy made false material representations for the purpose to defraud Plaintiff, refused to apply the same standard in providing the ERISA Plan benefits as they have to others, including but not limited to Jack N. Mogus and Robert Shipner.

COUNT IV

75. Plaintiff realleges the allegations of Paragraph 1 through 63 above.

76. Defendant ALPA breached its known duty of legal duties, accept payment for the outstanding union dues and thereby indemnified Plaintiff from any future liability under the RLA union security clause.

77. ALPA had the known legal duty to protect Plaintiff's rights and select a neutral and defend Plaintiff's

rights through arbitration and through the courts.

78. ALBA breached its duty of fair representation owed to Plaintiff as the exclusive bargaining agent under the RLA 45 U.S.C. # 152 et seq.

COUNT V

79. Plaintiff realleges the allegations of Paragraphs 1 through 78 above.

80. Defendants breached their known legal duties, failed to disclose to Plaintiff that the Chairman of the Pension Dispute Board, ("PDB"), was the responsible official of Defendants who discharged Plaintiff on June 17, 1986, a flawed and unlawful discharge which was reversed based upon the denial of Plaintiff's rights to appeal this discharge through arbitration, Defendants actions in omission, material misrepresentation, and fraud.

COUNT VI

81. Plaintiff realleges the allegations of Paragraphs

1 through 80 above.

82. Defendants conspired to bribe the neutral referee selected and employed by Plaintiff to arbitrate the union security clause issue as to Document 102.

83. Defendants bribed the neutral referee.

84. Defendants employee, Martin Soll, on or about August 14, 1986 met with the neutral referee Laurence E. Seibel exparte, solely for the unlawful purpose for the commission of bribe, made an offer of economic value, made statements of material false representations which he wanted to be included in the arbitration decision, he did ask to have the "neutral" make a decision favorable to the Defendants, and in all other means committed an unlawful crime of bribery.

85. Defendants with out right, with out privilege, as a matter of making good on their bribe did pay money, transferred bribery money to the "neutral" Seibel in payment

for a decision favorable to them and their cause, and provided economic value.

86. Defendants provided a list of neutrals to Plaintiff, and had personal knowledge that Seibel was on the "take", that he would and could be used to provide a decision through the offer of economic value, a bribe for official misconduct and a breach of known legal duty.

87. Defendants as a matter of conspiracy, mail and wire fraud carried out the unlawful crime of bribery.

COUNT VII

88. Plaintiff realleges the allegations of Paragraphs 1 through 87 above.

89. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate, agreed to defraud Plaintiff, impeding, impairing, obstructing, and defeating the lawful government function of the United States and the State of Florida in the lawful government functions to protect

the civil rights of the Plaintiff.

90. Defendants in violation of Section 1983 under the color of law made false material misrepresentations to the Court in the instant cause, committed these unlawful acts through interstate mail and wire fraud.

91. Defendants' employees Gary Green, Felice Busto and Robert Kofman did knowingly, wilfully, intentionally made false material misrepresentations that Mogus and Copeland, officials of Defendant ALPA were arbitrators and immune from prosecution or liability for unlawful acts committed in their actions against Plaintiff.

92. Defendants had personal knowledge, and had known duty of legal duties as officers of the court, that Mogus and Copeland did not or could not function as arbitrators since they had a vested interest in the Defendant Plan, they were official of Defendant ALPA, they were paid by Defendant ALPA, they did not break a deadlock, they had

a conflict of interest in the instant cause involving the union security clause.

COUNT VIII

93. Plaintiff realleges the allegations of Paragraphs 1 through 92 above.

94. Gibson, Tegtman, Mogus and Copeland had personal knowledge that as members of the Pension Dispute Board, PDB as fiduciaries, they had a conflict of interest, could not decide Plaintiff's rights under ERISA and the Plan, based upon the documented conflict of interest.

95. Gibson, Tegtman, Mogus and Copeland had the known legal duty as members of the PDB to recuse and disqualify themselves based upon conflict of interest.

96. Gibson, Tegtman, Mogus and Copeland did unlawfully, wilfully and knowingly conspire to defraud Plaintiff in violation of ERISA 511 of Plan benefits, imped-ed, impaired, obstructed and defeated the lawful function of

the Pension Dispute Board as established under the laws of the Untied States.

97. Gibson, Tegtman, Mogus and Copeland used interstate wire and mail to defraud Plaintiff.

COUNT IX

98. Plaintiff realleges the allegations of Paragraphs 1 through 97 above.

99. Defendants did unlawfully, wilfully and knowingly conspires, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing and defeating the lawful government function of the Railway Labor Act, a law of the United States to promote industrial administration of employee rights in interstate commerce.

100. Defendants used mail and wire in violation of this Count in the fraud committed against Plaintiff.

COUNT X

101. Plaintiff realleges the allegations of Paragraphs

1 through 100 above.

102. Defendants with out right, privilege or excuse failed to allow Plaintiff medical treatment as of his occupational injury on June 15, 1986.

103. Unknown to Plaintiff on June 16, 1986, Defendants had formed an enterprise for the purpose of continuing an unlawful pattern of racketeering, had Defendant Gibson, a corporate officer of Eastern and a member of the Pension Dispute Board, in a covert act was planning to discharge Plaintiff's employment to interfere with Plaintiff's attained ERISA and Plan rights based upon his occupation disability injury on June 15, 1986.

104. Defendants continued to harm, injure Plaintiff, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff through the refusal to provide him the protection of Section 3.6 of the Plan, to allow the Eastern Airlines Medical Department to examine

Plaintiff and give a medical opinion as to his qualifications for the disability benefit pension.

105. Defendants used interstate wire and mail in this Count.

COUNT XI

106. Plaintiff realleges the allegations of Paragraphs 1 through 105 above.

107. Plaintiff appealed to the United States Department of Labor, Pension and Welfare Benefits Administration (USDOL) for the protection of his ERISA rights, resulting in the November 9, 1987 letter to the Pension Dispute Board (Exhibit 13) and the November 30, 1987 letter to the Board of Trustees (Exhibit 14).

108. USDOL demanded that Plaintiff be examined by the Eastern Medical Department, and that a response reach the USDOL by December 18, 1987

109. Defendants allowed Plaintiff to be examined

by the Eastern Medical Department on December 18, 1987.

110. Defendants with out privilege or excusable right removed said medical report from the Eastern Medical Department and hid and in other means denied Plaintiff's rights under the Plan and ERISA, as a matter of violating ERISA Section 511.

111. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud the Plaintiff by impeding, impairing, obstructing, and defeating the lawful government actions of the Department of Labor, a Department of the United States responsible for the administration and enforcement of the Employee Retirement Income Security Act of 1974 (ERISA).

112. Defendants committed the unlawful acts complained of through the use of interstate wire and mail

COUNT XII

113. Defendant Travelers Insurance Company had

received a copy of the Eastern Airlines Medical, dated December 18, 1987 on December 28, 1987 (Exhibit 7), hid said document, refused to provide same to the Workers' Compensation Board, State of New York, ("WCB"), when ordered by the WCB Law Judge on April 11, 1988, at which time Travelers was represented, directed the carrier to produce all medical evidence from employer's (Eastern's) clinic referable to Plaintiff, Travelers has said medical but refused to comply and provide it to the WCB, Plaintiff realleges allegations in Paragraphs 1-112.

114. On January 6, 1989 the WCB Law Judge again ordered Travelers to produce said medical report, again Defendant Travelers refused to comply with the direct order from the WCB.

115. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing, and defeating

the lawful government functions of the Workers' Compensation Board, State of New York in providing protection, compensation for the injury suffered by Plaintiff in his employment.

116. Defendants committed fraud upon the WCB and the Plaintiff through omission and false material misrepresentations.

117. Defendants used interstate wire and mail in this Count.

COUNT XIII

118. Plaintiff realleges the allegations in Paragraphs 1 through 117 above.

119. Defendants removed and subsequently failed and refused to provide the Pension Benefit Guaranty Corporation, ("PBGC"), the December 18, 1987 Eastern Medical Report which certified Plaintiff's disability under Section 3.6 of the Plan, as to his eligibility and qualifications as to the

disability benefit pension.

120. Defendant used this unlawful act to deny and to refuse Plaintiff's ERISA and Plan rights, and to date Plaintiff has not received any money or dispensation of any benefit under the provisions of the Plan.

121. Defendants through interstate mail and wire have unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing, and defeating the lawful government functions of the Pension Benefit Guaranty Corporation, a government corporation incorporated under ERISA, and had an obligation to pay from available Plan assets Plaintiff's liability under the Plan that was due prior to the termination of the Plan on or about October 5, 1990, because the PBGC became trustee of the Plan, and Plaintiff's vested and earned disability became due and payable as of the June 15, 1986.

122. There were sufficient funds to pay Plaintiff.

COUNT XIV

123. Plaintiff realleges the allegations of Paragraphs 1 through 122 above.

124. Defendant William R. Tegtman ("Tegtman"), represented by attorney of record, Maurice Baumgarten met with Plaintiff on or about May 2, 1991 at the Causeway Hotel, Miami, Florida and provided, but not limited to, the following documents:

(a). EMPLOYEE RECORD CHANGE NOTICE, the termination notice of Plaintiff's employment dated 7-7-86, back dated as effective 06-17-86, as approved by A.C. Gibson, V.P. Pilot Relations/Adm. Eastern Airlines, Inc. and the Chairman and member of Defendant Pension Dispute Board. (Exhibit 15).

(b). Letters dated December 1, 1986 in which Defendants unlawfully stated: "will fight it as far as we have to", disclosing the ongoing conspiracy to defeat

Plaintiff's WCB and ERISA rights through unlawful means, (Exhibit 16), and the December 11, 1986 letter in which Defendants sent by interstate mail continued the unlawful activity to defraud Plaintiff made the material misstatement of fact: "Captain Gellert was terminated on June 17, 1986" (Exhibit 17) which was a material false statement of fact, a legal fact known or should have been known to Defendants.

125. These are acts are by design reckless and intent in causing injury, and did injure Plaintiff.

126. On or about October 9, 1991 Gibson testified under oath before the WCB, New York that he discharged Plaintiff.

COUNT XV

127. Plaintiff realleges the allegations of Paragraphs 1 through 126 above.

128. Plaintiff was informed by Defendants that his ERISA pension rights would be lost is he failed to return to

Eastern as an employee during a strike by ALPA pilots.

129. Plaintiff informed Defendants that he was failed by the Eastern Medical Department on December 18, 1987, and that a new medical examination was required by Eastern.

130. Plaintiff did report to Eastern for employment, he considered himself back on the payroll as a Captain simulator instructor, a position that Plaintiff was able to perform.

131. Defendant ALPA responded to Plaintiff on April 6, 1989, (Exhibit 18), and informed Plaintiff that any interference with ERISA benefits would be unlawful, but ALPA would not protect Plaintiff's ERISA pension rights.

132. Defendants informed Plaintiff on January 15, 1991 that Gibson directed Eastern not to rehire Plaintiff, and violated Plaintiff's rights under law as a disabled applicant, and violated Plaintiff's civil rights, Constitutional rights under Section 1983.

133. Plaintiff again found his retirement benefits under ERISA and the Plan placed outside reason, law and denied on factors beyond the Plan's borders.

134. Defendant Gibson's violated Plaintiff's civil rights by a directive that Plaintiff was not eligible to be rehired.

COUNT XVI

135. Plaintiff realleges the allegations of Paragraphs 1 through 134 above.

136. Plaintiff contacted Defendant ALPA, through its general counsel Gary Green on January 27, 1992, during a break in the instant cause of action, and demanded assistance, legal representation under the duty of fair representation.

137. ALPA denied representation while admitting a duty as the exclusive bargaining agent for all Eastern pilots, but expressed an intent to defeat Plaintiff's ERISA claims.

138. ALPA has a duty to provide fair and impartial consideration of the interest of all pilot employees, ALPA as the exclusive bargaining agent as such, has the duty to exercise the power in their interest and behalf, akin to the duty owed by other fiduciaries paralleling the responsibilities of corporate officers, trustees, attorneys, a duty of care as well as a duty of loyalty, the duty to represent the Plaintiff honestly and in good faith. ALPA refused the duty required.

139. ALPA's action is a breach of duty, ("DFR") an actionable breach.

COUNT XVI

140. Plaintiff realleges the allegations of Paragraphs 1 through 139 above.

141. ALPA has paid for attorneys and in all manner consistent has provided legal representation to defraud Plaintiff of ERISA Plan benefits and other earned and vested employee rights as a matter of conspiracy and to intentional-

ly breach its known legal duty to Plaintiff.

142. Gary Green and Felice Busto were the two ALPA attorneys who successfully discharged Plaintiff's employment, and have successfully denied Plaintiff's ERISA Plan, and have become the attorneys of record in this cause.

143. Defendant ALPA's activity in the engagement of legal representation to take away, deny and to defraud Plaintiff's ERISA Plan rights is interference, a legal landscape in this specific time, it is behavior so far outside a wide range of reasonableness as to be irrational.

144. Defendant ALPA used interstate wire and mail to defraud Plaintiff, without justifiable excuse, lacking any right privilege and committed these acts in a willful and deliberate manner.

COUNT XVII

145. Plaintiff realleges the allegations and Paragraphs 1 through 144 above.

146. Defendants in a conspiracy to defraud Plaintiff of ERISA, Plan and other earned benefits in a clear and intentional violation of Section 510 of ERISA # 1140 discharged Plaintiff's employment on June 17, 1986 for the purposes with the attainment to the disability benefit pension to which he became entitled to on June 15, 1986.

147. When the June 15, 1986 discharge was reversed, October 17, 1986, was used as a new discharge date.

148. Defendants action of denial of Plaintiff's ERISA and Plan rights as attained on June 15, 1986 based upon a subsequent discharge on October 17, 1986, some four months later, is a prima facie case in violation of Section 510.

149. Defendants used interstate wire and mail in the commission of acts complained of.

COUNT XVIII

150. Plaintiff realleges the allegations and Para-

graphs 1 through 149 above.

151. Defendants defrauded Plaintiff of ERISA and Plan benefits and rights as a matter of conspiracy in an intentional and deliberate violation of Section 511 of ERISA # 1141, continue to restrain, intimidate to interfere with the exercise of rights to the disability benefit pension.

152. Defendants used interstate wire and mail in the commission of the criminal acts complained of in this action.

153. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to defraud Plaintiff by impeding, impairing, obstructing and defeating the lawful functions of Plaintiff rights to the attainment of ERISA and Plan benefits, Defendants continue to restrain, intimidate and interfere with the exercise of those ERISA rights and benefits.

154. Defendants by trick, scheme and in other unlawful means moved against Plaintiff's ERISA rights, and

claiming immunity under the RLA preemption as a matter of fraud.

COUNT XIX

155. Plaintiff realleges the allegations and Paragraphs 1 through 154 above.

156. Defendants have not provided Plaintiff all the information and documents as requested in the December 28, 1989 letter, notwithstanding the fact that it did, in April 1990, provide some of the information.

157. Defendants have since December 1985 to date failed and refused to provide information as to documentation of Plaintiff's retirement benefits and options.

158. Plaintiff has requested this information and the failure to provide this documentation has prejudiced his case since he is unaware of his retirement benefits and options.

159. Defendants' failure to provide this information as requested within 30 days is in violation of Section 502 of

ERISA 29 U.S.C. # 1132.

160. Actions complained of were through the use of interstate wire and mail.

COUNT XX

161. Plaintiff realleges the allegations and Paragraphs 1 through 160 above.

162. Defendants did unlawfully, wilfully and knowingly conspire, combine, confederate and agree to deny Plaintiffs rights as secured by the Constitution and laws of the United States for injury under the color of law by impeding, impairing, obstructing and defeating the lawful government functions

(a) First Amendment, Defendants denied Plaintiff's right to free speech through the forced collection of union dues, forcing an unlawful ideological conformity of which Plaintiff complained of.

(b) Fifth Amendment, Defendants violated Plain-

tiff's right to due process, conspired to defraud Plaintiff of property, failed to provide a fair hearing through the bribery of the neutral, through the use of Gibson as a fiduciary under ERISA, nd through fraud in claiming the privilege of immunity under the RLA reemption from suit for compensation and damages.

(c) Seventh Amendment, Defendants have committed torts and wrongs at common law, and have denied Plaintiff's right to a jury trial through fraud in claiming immunity.

163. Defendants have violated 42 U.S.C. Section 1983 when under the color of law taken Plaintiff's property as to pension and other earned and vested employee benefits, employment, refused to rehire him, defamed, injured him through interference with contractual rights without corresponding interest or right.

164. The acts complained of were committed

through interstate wire and mail.

COUNT XXI

165. Plaintiff realleges the allegations and Paragraphs 1 through 164 above.

166. Defendants through the actions of this complaint did violate RICO, through the existence of an enterprise and a pattern of racketeering committing more then two predicate crimes, acts of racketeering within the past ten years, these acts were connected by a common scheme, plan an motive, constituting an unlawful pattern.

167. 18 U.S.C. # 1962(c) in essence prohibits persons from forming or joining an interstate concern and conducting or participating in the concern's affairs through the means of organized, concerted criminal activity in defrauding the United States, the passengers of Eastern and the Plaintiff.

168. The action complained of is based upon an

indictment consisting of some sixty (60) Counts by a federal grand jury, and a plea agreement consisting of admissions of guilt to more then eight (8) Counts by more then one defendant.

169. The action complained of resulted in a number of violations by the Federal Aviation Administrations of the Department of Transportation against defendants.

170. The action complained of documents a violation of Section 511 ERISA # 1141, a criminal statute.

171. The action complained of documents a count of bribe, a felony criminal violation.

172. The action complained of had as an element over twenty (20) acts of interstate wire and fail fraud.

173. The action complained of has alleged over twenty (20) acts of conspiracy.

174. This complaint alleges over two predicate crimes.

175. The acts complained of are economic crimes of extortion, demanding payments of money through inter-state mail and wire of money not owed, a legal fact known to all Defendants. Retaliation against Plaintiff when he complained and resisted the ongoing extortion.

176. The acts complained of are labor and union violations of federal law.

177. The acts complained of are in retaliation of Plaintiff's duty under Federal Air Regulations, and made him a victim under RICO.

178. Defendants "associated in fact" at least as early as July 24, 1985 to form an "enterprise" that effects interstate commerce as defined by 18 U.S.C. # 1961(4). This enterprise has functioned formally and informally since that time to this day, as a continuing unit, with common purpose of engaging in a massive, concerted, illegal effort to force Plaintiff to pay money which he did not owe, had no

legal obligation to pay, then to take a less amount under the ERISA Plan then what was due and payable under law. This action is economic extortion.

178. All Defendants are "persons" as defined by 18 U.S.C. # 1961(3). Defendants associated themselves with the enterprise described above and conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. # 1962(c).

179. Specifically, Defendants knowingly, willfully and unlawfully devised and executed an illegal scheme carried out through their use of the enterprise in an illegal effort to extort money which was not owed, falsified union dues records, Defendants' economic extortion was to force Plaintiff unlawfully to relinquish his claim under ERISA, the Plan and contract for self gain, retaliate against Plaintiff for his refusal to violate Federal Regulations and join the ongoing conspiracy to defraud the United States and the passengers

of Eastern. Although Defendants have not fully accomplished their goal of their illegal scheme to date, they have discharged Plaintiff's employment, denied Plaintiff's ERISA Plan funds for over five and a half (5 1/2) years, pocketed money for self gain, violated Plaintiff's rights under the First, Fifth and Seventh Amendments, Federal Air Regulations, they have severely injured Plaintiff in pursuit of their scheme by means of numerous false and fraudulent statements transmitted through the interstate mails and wire, extortion and through the commission of numerous other criminal acts.

180. The illegal acts described above in Paragraphs 1-179 above constitute "racketeering activity" as defined by 18 U.S.C. # 1961(1). That racketeering activity was related and continuous and defendants threaten to continue that unlawful activity in the future in pursuit of their illegal scheme. This activity constitutes a "pattern of racketeering activity"

as set forth in 18 U.S.C. # 1961(5).

181. By reason of defendants violation of 18 U.S.C. # 1962(c) Plaintiff has suffered injury in his earned and vested ERISA, Plan and contractual rights, property and personal life and reputation.

COUNT XXII

182. Florida "Civil Remedies for Criminal Practices Act", Fla. Stat. # 772.101 et seq. sets forth "prohibited activities" under the Act at Fla. Stat. # 772.103. Section 772.103(3) makes it unlawful, inter alia, for any person associated with an enterprise to conduct or participate in such enterprise through a pattern of criminal activity. Section 772.103(3) in essence prohibits persons from forming or joining a concern and conducting or participating in the conduct of the concern's affairs through the means of organized, concerted criminal activity.

183. Defendants "associated in fact", at least as

early as of July 24, 1985, to form an "enterprise" as defined by Florida Statute # 772.102(3). This enterprise, which has conducted a substantial portion of its activities in Florida, has functioned formally and informally since the time to date, as a continuing unit with the common purpose of engaging in a massive, concerted illegal effort to force Plaintiff to pay, and in other means relinquish great sums of money, in order for the Defendants to gain an economic advantage and pocket great sums of Plaintiff's money.

184. Defendants associated themselves with the enterprise and conducted and participated in the conduct of enterprise through a pattern of criminal activity in violation of # 772.103(3).

185. Specifically, Defendants knowingly, willfully, and unlawfully devised and executed an illegal scheme, carried out in substantial part in Florida through their use of the enterprise in an illegal effort to force the Plaintiff to

relinquish his rights of property, pay sums of money in violation of Florida Statutes, so that Defendants can acquire same for themselves. Although Defendants have not fully accomplished the goal of their illegal scheme to date, Defendants have benefited, received economic advantage, pocketed money, and have severely injured Plaintiff in pursuit of their scheme by means of numerous false and fraudulent statements transmitted interstate mail and wires, committed extortion, bribery and through commission of numerous other criminal acts.

186. The illegal acts described in Paragraphs 1 through 185 above, constitute "criminal activity" as defined by Fla. Stat. # 772.102(1)(a)(22) and (b). As set forth above, Defendants have engaged in numerous different, yet related incidents of continuous criminal activity over more then a six-year period in furtherance of their goal to illegally acquire money and other economic advantage from Plaintiff.

187. This activity constitutes a "pattern of criminal activity" as defined by Fla. Stat. 772.103(3).

188. Plaintiff has been injured by reason of Defendants' violation of Fla. Stat. # 772.103(3).

189. Plaintiff realleges the allegations of Paragraphs 1 through 188 and Counts I through XXII in any order above.

190. Defendants through their actions have defamed, and have interfered with Plaintiff's rights to employment, a matter which is protected by the State of Florida, protected by federal law, and civil rights Equal Employment Statute.

191. Defendants have caused permanent, severe intentional distress to Plaintiff through actions in Paragraphs 1 through 190, Counts I through XXII.

DAMAGES

191. Defendants' unlawful conduct, as described in the foregoing legal counts, has caused actual damages to

Plaintiff, the magnitude of which is enormous. Plaintiff estimates that Defendants actions in misconduct has caused actual damages of $1,000,000.00, to date, if unlawful activities continue then these damages will increase.

PUNITIVE DAMAGES

192. Defendants' disparagement of property, defamation, tortious interference with contractual rights, ERISA Plan rights, interference with Plaintiff's rights to employment, business advantage, investments, conspiracy to induce breaches of fiduciary duty, bribery, fraud, breaches of known legal duty and all other actions described in Paragraphs 1 through 191 herein, were committed knowingly and intentionally for the purpose of injuring Plaintiff. Consequently, Plaintiff is entitled to recover from Defendants punitive damages, which Plaintiff claims in an amount no less then 5 million dollars.

WHEREFORE, Plaintiff prays for judgment as

follows:

(a) an award to Plaintiff of such damages as he shall prove at trial in an amount no less then $3,000,000.00 trebled as mandated by 18 U.S.C. # 1964(c) and Florida Statute # 772.104

(b) an award of punitive damages to Plaintiff in an amount no less then 5 million dollars;

(c) an award to Plaintiff for cost of this action, together with attorney fees pursuant to RICO;

(d) judgment under ERISA based upon Sections 510 & 511;

(e) award to Plaintiff any such different or further relief under ERISA this Court deem just and proper;

(f) payment of legal fees as authorized under ERISA;

(g) legal representation by ALPA under the duty of fair rescntation;

(h) award $100.00 per day from January 1986 to date of judgment for violation of 502 ERISA 29 U.S.C. # 1132;

(i) an award to Plaintiff both pre-judgment and post-judgment interest on their actual damages, at the highest interest rate permitted by law;

(j) an award to plaintiff any such different or further relief this Court may deem just and proper.

PLAINTIFF DEMAND THAT THIS ACTION BE TRIED BY JURY.

/s/ DANIEL GONZALES GELLERT, pro se

February 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.

DEFENDANT TRAVELERS INSURANCE COMPANY'S MOTIONS TO DISMISS AND STRIKE AND MEMORANDUM IN SUPPORT

Defendant, The Travelers Insurance Company ("Travelers"), pursuant to the Federal Rules of Civil Procedure, respectfully moves this Court to:

1. dismiss the Plaintiff's third and proposed fourth amended complaints pursuant to Rules 12(e) and 41(b)

for violating a previous court order; or in the alternative,

2. strike the Plaintiff's complaints pursuant to Rules 8(a) and 12(f) for being verbose, rambling, immaterial and impertinent; or in the alternative,

3. dismiss or strike the Plaintiff's complaints pursuant to Rules 8(a) an 12(e) for being so vague and ambiguous so as to not permit Travelers to frame a responsive pleading,

4. dismiss all counts in the Plaintiff's complaints pertaining to Travelers pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

This action was commenced when Plaintiff filed a two-count complaint on May 9, 1990 against various Defendants (not including Travelers) to recover retirement and pension benefits allegedly owing to him. An amended complaint generally setting forth the same two counts was filed

on May 29, 1990. In an order filed September 6, 1991, this Court dismissed count I with prejudice on grounds that the Plaintiff's claim was time barred by the statute of limitations under the Railway Labor Act (RLA), 45 USC §153(first)(r). This Court held that the complaint only challenged the Pension Dispute Board's findings and was not based on a breach of fiduciary duty, and accordingly the longer ERISA statute of limitations had no application. This Court also granted individual Defendants Mogus and Copeland's motions to dismiss on the separate ground that they could not be found personally liable.

Plaintiff, acting pro se, then filed a 10-count first amended complaint against numerous Defendants [Travelers was named as a Defendant but was never served or notified of the action] on January 30, 1992, alleging claims under RICO, 18 USC §1961 et seq.; ERISA, 29 USC 1132 et seq.; 42 USC §1983; statutory and common law of Florida, and

under the laws of Workers' Compensation Board. In an Order dated February 13, 1992, this Court struck Plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion" of September 6, 1991. This Court granted Plaintiff 20 days leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed by Order of this Court" (emphasis in original).

Contrary to the express terms of this Court's order, Plaintiff filed a third and proposed fourth amended complaint against various Defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint struck by this Court.[1]

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[1] Plaintiff actually filed a second amended complaint prior to this Court's sua sponte dismissal, which complaint also improperly contained the same causes of actions and

Furthermore, the additional counts and arguments contained in the third and fourth amended complaints (each of which spans 38 pages) are so intertwined, verbose, immaterial and confusing that it is impossible to ascertain with a reasonable degree of certainty what allegations are made and against which Defendants. While it appears that only Count XII is directed against Defendant-Travelers (wherein Travelers, the worker's compensation carrier of Plaintiff's former employer, Eastern Airlines, is alleged to have violated an administrative law judge's discovery order in a New York state worker's compensation proceeding), Plaintiff generically refers to "Defendants" in nearly every other count.

MEMORANDUM OF LAW

1. Motion to Dismiss for Violation of Court Order pursuant to Rules 12(e) and 41(b)

The Plaintiff's continuing failure to comply with this

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defendants.

Court's order of February 13, 1992, calls for the dismissal with prejudice of the third and proposed fourth amended complaints. Federal district courts, pursuant to Rules 12(e) and 41(b), have repeatedly dismissed complaints for a plaintiff's failure to timely file an amended complaint in conformity with a previous court order. E.g., Agnew v. Moody, 330 F.2d 868, 870-71 (9th Cir.), cert. denied, 379 U.S. 867 (1964) (upholding Rule 41(b) dismissal of complaint after 2 1/2 months passed beyond 20 days allowed by court order to amend verbose complaint which violated Rule 8(a)'s "short and plain statement" requirement); Hall v. Killingsworth, 253 F.2d 43, 43 (D.C. Cir. 1958) (upholding dismissal of complaint after 2 months passed beyond 20 days allowed by court order to file more specific and definite complaint).

In Echols v. Voisine, 506 F.Supp. 15 (E.D. Mich. 1981), aff'd, 701 F.2d 176 (6th Cir. 1982), for example, while recognizing that a burden is placed on a pro se plain-

tiff to properly draft an extensive conspiracy complaint, the court stated that it "cannot lose sight of the fact that the primary purpose of procedural rules is 'to promote the ends of justice,'" id. at 17, and accordingly dismissed the plaintiff's complaint with prejudice for continually failing to comply with a court order to file a comprehensible pleading. Id. at 16-19.

In the present action, the Plaintiff has openly ignored this Court's prior order which set forth in underlined bold print that no reference be made to any previously counts. Over 3 1/2 months have passed since this Court's order allowing Plaintiff 20 days to properly amend his pleadings. Although Plaintiff is a pro se complainant, his continual flaunting of this Court's authority requires the harsh sanction of dismissal with prejudice.

2. Motion to Strike for being Verbose, Rambling, Immaterial and Impertinent pursuant to Rules 8(a) and 12(f)

In the alternative, this Court should strike Plaintiff's third and proposed fourth amended complaints pursuant to Rules 8(a) and 12(f) for being unduly verbose, rambling, immaterial and impertinent. The Plaintiff's 38-page pleading is a "labyrinth of unwarranted, scandalous and vituperative allegations" which in no way conforms to Rule 8(a)'s "short and plaint statement" requirement and accordingly should be struck. See Prezzi v. Berzak, 57 F.R.D. 149, 150-51 (S.D. N.Y. 1972) (pro se plaintiff's complaint struck for needlessly rambling, speculating, accusing and condemning); see also Newman v. Commonwealth of Massachusetts, 115 F.R.D. 341 (D.Mass. 1987) (striking plaintiff's complaint for violation of Rule 8(a)'s "plain and simple statement" requirement).

3. Motion For More Definite Statement pursuant to Rules 8(a) and 12(e) for being Vague

and Ambiguous .

In the alternative, this Court should at the very least dismiss or strike Plaintiff's third and proposed fourth amended complaints pursuant to Rules 8(a) and 12(e) because they beyond question are "so vague or ambiguous that [Travelers] cannot reasonably be required to frame a responsive pleading." Rule 12(e); see also Federal Deposit Ins. Corp. v. Wise, 758 F.Supp. 1414, 1418 (D.Colo. 1991); American Sheet Metal, Inc. v. Em-Kay Engineering Co., Inc., 478 F.Supp. 809, 814-15 (E.D. Cal. 1979) (vague and ambiguous pleadings subject to Rule 12(e) where adverse party cannot ascertain true nature of issues he must meet).

Due to the incredibly confusing, redundant and verbose nature of Plaintiff's 38-page complaint, Travelers cannot properly determine which causes of actions are being pled and against which Defendants they are aimed. While it would appear that the only potentially relevant allegations

leveled against Defendant-Travelers are found in Count XII, Plaintiff generally refers to the "Defendants" in nearly every count. It is accordingly impossible to frame an intelligent response to this document, especially since it contains claims which were previously dismissed by this Court in addition to new incomprehensible allegations.

4. Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted pursuant to Rule 12(b)(6)

In the alternative, Travelers should be dismissed from this action pursuant to Rule 12(b)(6) because the Plaintiff's third and proposed fourth amended complaints do not set forth any cognizable cause of action against it.

Again, it appears that only Count XII is directly aimed at Travelers. Plaintiff states that Travelers is the worker's compensation carrier for Plaintiff's former employer, Eastern Airlines. See Plaintiff's third and proposed fourth amended complaints at ¶14. He alleges in Count XII

that Travelers, in an administrative proceeding before the Workers' Compensation Board of the State of New York, failed to comply with a law judge's order of April 11, 1988, directing Travelers to produce all relevant medical evidence from his employer's (Eastern's) medical clinic. Id. at ¶113.

Plaintiff further alleges that Travelers was hiding a copy of the "Eastern Airlines Medical, dated December 18, 1987" and that the law judge again ordered Travelers to produce the medical report by Travelers refused. Id. at ¶¶ 113-14. From these actions, the Plaintiff then states that "Defendants" conspired to defraud him by obstructing the Board's provision of compensation and that the "Defendants" committed fraud. Id. at ¶¶ 115-16. "Defendants" are also said to have used interstate wire and mail in this count. Id. at ¶117.

Even taking the factual allegations set forth in Count XII as true, Plaintiff has not stated any claim against Travel-

ers upon which relief can be granted for at least two reasons. First, the complaints are infirm as a matter of law because Plaintiff has failed to allege how he was damaged or injured by Travelers' actions. Whether Plaintiff proceeds under RICO (18 USC §§ 1961 et seq.) or state statutory (Fla. Stat. §772.104 - Florida RICO) or common law theories based on conspiracy or fraud, it is essential to each of these theories that the Plaintiff set forth facts showing how he was damaged by the Defendant's action.[2]

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[2] See O'Rear v. American Family Life Assur. Co., 139 F.R.D. 418, 421-22 (M.D. Fla. 1991) (complaints alleging fraud and RICO dismissed for failing to state how Plaintiff was damaged and how Defendant's actions caused those damages); Bozcar v. Manatee Hospitals & Health Systems, Inc., 731 F.Supp. 1042, 1047 (M.D. Fla. 1990) (complaint alleging RICO dismissed for failure to state a claim where no facts were alleged demonstrating injury flowing from Defendant's misconduct); Ouaknin v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990) (same); Shearin v. E.F. Hutton Group,Inc., 885 F.2d 1162, 1167-68 (3d Cir. 1989) (same); §772.104 (Plaintiff must show he was "injured" by Defendant's criminal misconduct under Florida RICO act); Tippett v. Frank, 238 So.2d 671, 673 (Fla. 3d DCA 1970) (common law fraud claim legally insufficient where no facts alleged

Here, the complaints are devoid of any factual allegations showing how the Plaintiff was injured or damaged as a result of Travelers' alleged withholding of a discovery document. To the contrary, Plaintiff openly concedes in his complaints that he received "the maximum ambulatory award" as a result of the workers' compensation decisions. See Complaints at ¶66. Plaintiff has admitted, therefore, that he suffered no injury or harm as a result of any alleged actions by Travelers. Actual harm, an essential element of all Plaintiff's putative claims, is missing and accordingly Travelers must be dismissed from the action.[3]

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showing injury resulted from misconduct); National Equipment Rental, Ltd. v. Little Italy Restaurant & Delicatessen, Inc., 362 So.2d 338 (Fla. 4th DCA 1978) (actual damages are essential element of fraud claim); Ocala Loan Co. v. Smith, 155 So.2d 711, 716 (Fla. 1st DCA 1963) (complaint alleging conspiracy must set forth facts showing damage).

[3] Plaintiff's claims against Travelers should, furthermore, be dismissed with prejudice. This Court should take judicial notice of the Workers' Compensation Board Decision which Plaintiff filed as Exhibit Four to his first complaint.

Second, the complaints are deficient because any alleged misconduct on the part of Travelers for withholding a discoverable document in an administrative proceeding simply is not redressable in a separate legal action. Plaintiff was adequately protected by the rules and remedies provided for the resolution of discovery disputes in a New York state workers' compensation proceeding.[4] Plaintiff's attempt to

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The Board affirmed the law judge's decision to award the Plaintiff compensation at a rate of $150.00 reduced earnings. It was exactly because Travelers did not produce any reports from an examining physician of employer-Eastern Airlines that the Board concluded there was no contrary evidence to overturn the law judge's award. The Board decision against Travelers clearly shows that Plaintiff was not injured or damaged by any alleged document withholding on the part of Travelers. If anything, Travelers' alleged actions assisted the Plaintiff by serving as the basis of the affirmance of the award.

[4] Indeed, the Workers' Compensation Board Decision attached as Exhibit Four to Plaintiff's first complaint states that Plaintiff requested "that a penalty be assessed pursuant to Sect. 25-2(c) Workers' compensation Law," presumably for Travelers' alleged failure to produce the employer's medical records. The Board did not assess any penalty, however, as it held that Travelers' non-production of con-

convert what is at best an administrative discovery problem into a separate RICO, conspiracy of fraud action is unprecedented and unwarranted. Cf. Richmark Corp. v. Timber Falling Consultants, Inc., 730 F.Supp. 1525, 1531-32 (D. Ore. 1990) (no RICO action arises out of Defendant's concealing or withholding discovery in prior civil legal proceeding).

Furthermore, to the extent any or all of the other counts in the third and proposed fourth amended complaints may properly be construed as aimed at Travelers as one of the "Defendants," they clearly do not state a cause of action as there are no other date and time specific factual allegations of misconduct leveled against Travelers. See e.g., Truesdell v. Proctor, M.D., 443 So.2d 107, 108 (Fla. 1st DCA 1983) (where complaint alleges fraud or conspiracy,

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trary medical evidence only served to establish that the law judge's compensation award was not erroneous.

facts constituting Defendant's wrongdoing must be pled with specificity). Plaintiff has not alleged that Travelers in any way connected with his pension benefits or Plan rights. The only specific allegations as to Travelers are those set forth in Count XII, and as demonstrated above, these allegations are woefully deficient and do not give rise to any cognizable legal remedy. Accordingly, Travelers should be dismissed form this action.

WHEREFORE, Defendants Travelers respectfully requests this Court to: dismiss Plaintiff's third and proposed fourth amended complaints with prejudice; or in the alternative, dismiss or strike the complaints with leave to amend.

Respectfully submitted

HICKS, ANDERSON & BLUM, P.A.
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(305) 374-8171

/s/ MARK HICKS
/s/ GARY A. MAGNARINI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Travelers Insurance Company's Motions to Dismiss and Strike and Memorandum in Support was mailed this 28th day of May, 1992 to:

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Miami, Florida 33130

/s/ GARY A. MAGNARINI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.
_____/

MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND AND THE TRAVELERS INSURANCE CORPORATION

Plaintiff, DANIEL GONZALES GELLERT, in pro se hereby move this Honorable Court for the entry of summary judgment on Counts III. V. VII. VIII. IX. X. XI. XII.

XIV. XV. XVII. XVIII. XXI. XXII. and Sections 24, 40, 42, 58, 59, 60, 63, against defendants Eastern Airlines Pilots Retirement Board, a/k/a Pension Dispute Board, Alan C. Gibson, William R. Tegtman, Jack N. Mogus, Charles Copeland, and the Travelers Insurance Corporation of the Third Amended Complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Local Rule 10 J. In support of this motion, plaintiff files herewith memorandum of law, a Declaration of plaintiff Daniel G. Gellert (and supporting exhibits).

Plaintiff demands compensatory damages of $4,000,000.00 (4 million dollars of sum certain), and this sum trebled under RICO as provided pursuant to Counts XXI and XXII, demands $12,000,000.00 (12 million dollars) sum certain.

Dated April 7, 1993.

Respectfully submitted,

/s/_____
DANIEL GONZALES GELLERT pro se
P.O. Box 320370
Cocoa Beach, Florida 32932
(407) 783-9412

VOLUNTARY CHECK-OFF OF ASSOCIATION DUES received by telephonic facsimile from the Air Line Pilots Association's Herdon office, on January 13, 1993, and that this document was in effect from December 1, 1971 to the present, to authorize the deduction of money from any pay received from Eastern Airlines, Inc., for union dues, or any other financial obligations as to the payment of union dues under the Railway Labor Act, Eleventh, union security.

4. I met my responsibility under the Railway Labor Act, 45 U.S.C. 152 Railway Labor Act under the Agreement between Eastern Airlines, Inc. and the Air Line Pilots Association.

5. Defendants A.C. Gibson, W.R. Tegtman, C.H. Copeland J.N. Mogus and Travelers Insurance Corporation committed the acts complained of in the Third Amended Complaint based upon the June 22, 1987 Decision of the Dispute Board. **EXHIBIT B.**, and in the hiding by Travel-

ers Insurance Corporation, ("Travelers") the December 18, 1987 Eastern Airlines Medical, **EXHIBIT C.**, to provide this medical to the New York Workers'. Compensation Board, ("WCB") on demand. **EXHIBIT D.**, and Defendants injured plaintiff through claiming that he did not authorize deduction of his union dues, which are material false statements of fact, fraud committed in conspiracy.

6. Defendants have defamed plaintiff, Travelers sent the attached page from their records to medical doctors during the forced medical evaluations under WCB Law, in which Travelers published statements such as: "Captain Gellert was terminated from Eastern for nonpayment of his union dues ... According to Captain Burke, Captain Griffith, Captain Crane and Martin Soll at Eastern Airlines this claimant has a long history of erratic behavior with the airline ... The claimant has a conviction for nonpayment of income taxes accòrdng to Captain Crane." **EXHIBIT E.**

App. 7

MEMORANDUM OF LAW

Plaintiff files this memorandum of law in support of the entry of summary judgment since no genuine issue of material fact remains in this cause of action, upon which reasonable men or women could differ, and defendants do not have admissible evidence which could be placed before the jury to come to a different conclusion and find for defendants.

Based upon plaintiff's Third Amended Complaint, and Affidavit attached herein, plaintiff has proved conclusively as a matter of law, that plaintiff could not have been discharged from his Eastern Airlines employment for the nonpayment of union dues, since the Air Line Pilots Association had an in effect authorization from the plaintiff for the voluntary deduction of his union dues obligation, from December 1, 1971, at least until January 13, 1993.

Therefore, defendants have no admissible evidence

that may affect the outcome of this suit under the governing substantive law which could properly preclude the entry of summary judgment under Rule 56(c) of the Federal Rules of Civil Procedures. See: ANDERSON v. LIBERTY LOBBY, INC., 477 US 242, CELOTEX CORP. v. CATRETT, 477, US 317.

WHEREFORE, Plaintiff Daniel Gonzales Gellert, move the Court for entry of summary judgment against the Defendants for a sum certain of $12,000,000.00, and Plaintiff demands a jury trial for punitive damages.

Respectfully submitted,

/s/_____
DANIEL GONZALES GELLERT pro se

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this **7th** day of **April, 1993**, to:

Robert Kofman, Esq.
150 West Flagler Street
Suite 2200 Museum Tower
Miami, FL 33130

Mark Blank, Esq.
Pension Benefit Guaranty Corp.
2020 K Street, N.W.
Washington, D.C. 20006

Maurice J. Baumgarten, Esq.
Eastern Airlines, Inc.
Miami International Airport
Miami, Florida 33148

Mark Hicks, Esq.
Suite 2402 New World Tower
100 N. Biscayne Blvd.
Miami, FL 33132

/s/_____
DANIEL GONZALES GELLERT pro se
P.O. Box 320370
Cocoa Beach, Florida 32932
(407) 783-9412

AFFIDAVIT
(DECLARATION)

BREVARD COUNTY)
) SS
STATE OF FLORIDA)

BEFORE ME THE undersigned authority personally appeared, DANIEL GONZALES GELLERT, who after being duly sworn, deposes and states the following:

1. I am the plaintiff in Court Case No. 90-1113-CIV-MOORE, in which, Eastern Airlines Pilots Reitrement Board, a/k/a, Pension Dispute Board, Alan C. Gibson, William R. Tegtman, Jack N. Mogus, Charles Copeland and the Travelers Insurance Corporation are defendants.

2. I have personal knowledge of the following facts:

3. EXHIBIT A, is a true and correct copy of my Affidavit executed on the 16th Day of January, 1993, and EXHIBIT 1., attached to that Affidavit is a true and correct copy of the ASSIGNMENT AND AUTHORIZATION FOR

7. Defendant Gibson was the Eastern Airlines official who discharged plaintiff's employment after plaintiff's occupational injury, **EXHIBIT F.**, and following this, Gibson with the other defendants denied plaintiff's earned and vested benefits as a fiduciary under ERISA.

FURTHER AFFIANT SAYETH NOT.

/s/_____
DANIEL GONZALES GELLERT

SWORN TO AND SUBSCRIBED before me this 3rd day of March, 1993.

/s/Donna Christensen
NOTARY PUBLIC
STATE OF FLORIDA AT LARGE

COMM # CC 122056

MY COMMISSON EXPIRES: 6-27-95

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

CASE NO.: 90-1113-CIV-MORENO

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS and employee benefit pension plan, and EASTERN AIRLINES, INC., solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND and THE TRAVELERS INSURANCE CORPORATION,

Defendants.
_____/

DEFENDANT TRAVELER INSURANCE COMPANY'S MOTION TO STRIKE OR STAY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO EXTEND THE TIME TO RESPOND

Defendant Travelers Insurance Company files this motion to strike or stay Plaintiff's motion for summary judgment pending resolution of outstanding motions to strike or dismiss the third amended complaint. In the event the relief sought is denied, Travelers respectfully requests a 90-day extension of time from the date of the Clerk's entry of such Order to conduct discovery and to respond to Plaintiff's motion.

As grounds for its motion, Travelers states:

Background

This action was commenced when Plaintiff filed a two-count complaint on May 9, 1990 against various defendants (not including Travelers) to recover retirement and pension benefits allegedly owing to him. An amended com-

plaint generally setting forth the same two counts was filed on May 29, 1990. In an order filed September 6, 1991, this Court dismissed count I with prejudice on grounds that the Plaintiff's claim was time barred by the statute of limitations under the Railway Labor Act (RLA), 45 USC §153(first)(r). This Court held that the complaint only challenged the Pension Dispute Board's findings and was not based on a breach of fiduciary duty, and accordingly the longer ERISA statute of limitations had no application. This Court also granted individual Defendants Mogus' and Copeland's motions to dismiss on the separate ground that they could not be found personally liable.

Plaintiff, acting pro se, then filed a 10-count first amended complaint against numerous Defendants [Travelers was named as a Defendant but was never served or notified of the action] on January 30, 1992, alleging claims under RICO, 18 USC §1961 et seq.; ERISA, 29 USC 1132 et seq.;

42 USC §1983; statutory and common law of Florida, and under the laws of Workers' Compensation Board. In an Order dated February 13, 1992, this Court struck Plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed pursuant to this Court's Memorandum Opinion" of September 6, 1991. This Court granted Plaintiff 20 days leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed by Order of this Court" (emphasis in original).

Contrary to the express terms of this Court's order, Plaintiff then filed a third and proposed fourth amended complaint against various Defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint struck by this

Court.[1] Furthermore, the additional counts and arguments contained in the third and fourth amended complaints (each of which spans 38 pages) were so intertwined, verbose, immaterial and confusing that it was impossible to ascertain with a reasonable degree of certainty what allegations were made and against which Defendants. While it appeared that only Count XII was directed against Defendant-Travelers (wherein Travelers, the worker's compensation carrier of Plaintiff's former employer, Eastern Airlines, is alleged to have violated an administrative law judge's discovery order in a New York state worker's compensation proceeding), Plaintiff generically referred to "Defendants" in nearly every other count.

Accordingly, on May 28, 1992, Travelers moved to

---

[1] Plaintiff actually filed a second amended complaint prior to this Court's sua sponte dismissal, which complaint also improperly contained the same causes of actions and defendants.

strike or dismiss Plaintiff's Third Amended Complaint on grounds that Plaintiff's complaint was in violation of this Court's previous order or that it was impermissibly vague and ambiguous. Travelers also moved to dismiss the complaint because it did not state a claim upon which relief could be granted. Plaintiff never set forth in the complaint how he was damaged or injured by Traveler's actions. Moreover, Traveler's alleged misconduct in withholding a discoverable document in an administrative proceeding was simply not redressable in a separate legal proceeding.

On May 28, 1992, Travelers also filed a motion for protective order to stay discovery pending this Court's resolution of these dispositive motions. Travelers' motion to strike or dismiss and motion to stay discovery are currently pending before this Court.

On April 13, 1993, Plaintiff served Travelers with a motion for summary judgment based on the defective allega-

tions set forth in the Third Amended Complaint which have yet to be ruled upon by this Court.

Memorandum of Law

Travelers' respectfully requests this Court to strike Plaintiff's motion for summary judgment as premature or to stay it pending resolution of Travelers' previous dispositive motion to strike or dismiss Plaintiff's Third Amended Complaint. See Bagwell v. Brannum, 533 F. Supp. 362, 363 (N.D.Ga. 1982)(court must pass on dispositive motion to remand prior to reaching motion for summary judgment). This Court has the inherent power to stay part of this action based on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952).

Travelers has previously filed motions to dismiss or strike the very allegations which Plaintiff now claims he has

established as a matter of law. If the complaint is stricken, Plaintiff's summary judgment claim obviously falls. It is respectfully requested that this Court either strike or stay Plaintiff's motion as premature until resolution of Travelers' pending motions.

WHEREFORE, Defendant Travelers Insurance Company respectfully requests the Court to strike Plaintiff's Motion for Summary Judgment, or in the alternative, stay the motion until resolution of Travelers' pending motions. In the event the Court denies the requested relief, Travelers respectfully requests the Court to grant Travelers 90 days to conduct discovery and to respond to Plaintiff's motion for summary judgment.

Respectfully submitted,

HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone: (305) 374-8171

BY: /s/
MARK HICKS
FL BAR NO.: 142436

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Travelers Insurance Company's Motion to Strike or Stay Plaintiff's Motion For Summary Judgment, or in the Alternative, to Extend the Time to Respond was served by U.S. mail this 15th day of April, 1993 on:

Daniel Gonzalez Gellert, pro se
P.O. Box 320370
Cocoa Beach, Florida 32931
Telephone: (407) 783-9412

Robert T. Kofman, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street
Suite 2000 Museum Tower
Miami, Florida 33130
Telephone: (305) 789-3567

Mark Blank, Esq.
Office of the General Counsel
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

Maurice J. Baumgarten, Esq.
Eastern Airlines, Inc.
Miami International Airport
Building 16 - Room 440 MIALG
4800 N.W. 36th Street
Miami, Florida 33148

BY: /s/
MARK HICKS

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO. _____

DANIEL G. GELLERT,
Petitioner-Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, an employee benefit pension plan, and EASTERN AIRLINES, Inc. solely as Administrator of such defendant plan, PENSION BENEFIT GUARANTY CORPORATION, AIR LINE PILOTS ASSOCIATION, EASTERN AIRLINES PILOTS RETIREMENT BOARD a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION,
Defendants.
_____/

APPLICATION AND PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

DANIEL G. GELLERT in pro se
P.O. 320370
Cocoa Beach, Florida 32932
(407 783-9412

Case No. ____ CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT:

DANIEL G. GELLERT
vs.
EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al..

Air Line Pilots Association, ("ALPA")
Baumgarten, Maurice, Esq. Eastern Airlines, Inc.
Blank, Mark, Pension Benefit Guaranty Corporation ("PBGC")
Busto, Felice, Esq. ALPA
Callear, James Y. Esq. PBGC
Copeland, Charles, ALPA, PDB
Eastern Airlines, Inc. ("EASTERN")
Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots ("Plan")
Eastern Airlines Pilot Retirement Board a/k/a Pension Dispute Board ("PDB")
Flowe, Carol Connor, Esq., PBGC
Gibson, Alan, Eastern,
Green, Gary, ALPA
Kofman, Robert T. Esq. defendant ALPA's attorney
Mogus, Jack, N., ALPA, PDB
Moore, Michael, U.S. District Court Judge
Moreno, Federico, U.S. District Court Judge
Norfolk, Larry, L., PBGC
Pension Benefit Guaranty Corporation, ("PBGC")
Tegtman, William, Eastern
Hicks, Mark, Esq. attorney for defendant Travelers Insurance Company.

LIST OF EXHIBITS

1. ASSIGNMENT AND AUTHORIZATION FOR VOLUNTARY CHECK-OFF ASSOCIATION DUES

2. NOTIFICATION OF 90 DAYS EXPIRING AND RIPENESS FOR HEARING DATED August 6, 1993

3. NOTIFICATION OF 90 DAYS EXPIRING AND RIPENESS FOR HEARING dated July 21, 1993

4. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES PILOTS RETIREMENT BOARD, a/k/a PENSION DISPUTE BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION dated April 7, 1993

5. DEFENDANT TRAVELERS INSURANCE COMPANY'S MOTION TO STRIKE OR STAY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR TO EXTEND THE TIME TO RESPOND dated April 15, 1993

6. "DEFENDANTS" MOGUS AND COPELAND'S MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATED April 7, 1993 dated April 14, 1993

7. DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATED APRIL 7, 1993

8. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS AND THE PENSION BENEFIT GUARANTY CORPORATION dated April 19, 1993

9. OPPOSITION OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO MOTION OF PLAINTIFF DANIEL G. GELLERT FOR SUMMARY JUDGMENT dated May 5, 1993

10. AMENDED MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT AIR LINE PILOTS ASSOCIATION dated April 19, 1993

11. DEFENDANT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL'S MOTION TO STAY PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT PENDING THE RESOLUTION OF OUTSTANDING DISPOSITIVE MOTIONS dated April 23, 1993

12. MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT EASTERN AIRLINES, INC., solely as Administrator of such defendant plan dated May 13, 1993

13. DEFENDANT EASTERN AIR LINES, INC. MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT dated May 20, 1993

14. THIRD AMENDED COMPLAINT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. _____

DANIEL G. GELLERT,

Petitioner-Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Respondent-Defendants.

_____/

PETITION FOR WRIT OF MANDAMUS TO THE UNTIED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Petitioner, Daniel Gonzales Gellert is the Plaintiff in Case No. 90-1113-CIV-MOORE pending in the United States District Court of the Southern District of Florida, and files this petition for a Writ of Mandamus under Title V. Rule 21 of the Federal Rules of Civil Procedure, to command performance from the District Court, an inferior court

in this Circuit.

Plaintiff's Writ is to command ministerial duty, and to directing the restoration of Plaintiff's rights and privileges of which he has been deprived of, See: Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876; Cohen v. Ford, 19 PaCmwth. 417, 339 A2d 175, 177; 28 U.S.C.A. #1361; Will v. United States, 389, U.S. at 95 88 S.Ct. at 273, and to direct the District Court to exercise its authority in recognizing the duty under the Constitution in protecting Plaintiff's rights.

The District Court has refused to grant the Plaintiff's rights and privileges under the First, Fifth, Seventh and Fourteenth Amendments of the Constitution as mandated by the Supreme Court. See: INTERNATIONAL ASSOCIATION OF MACHINIST v. STREET, 367 US 740.

The instant cause has survivability based upon Plaintiff's evidence in support of legally recognized claim for relief, which transcends Defendants' frivolous motions to

dismiss, and strike. See: FEDERAL DEPOSIT INS. CORP. v. WISE, 758 F.Supp. 1414 (d. Colo. 1991).

Plaintiff's Motion for Summary Judgments are based upon rights recognized by the Supreme Court, in which Defendants defaulted, failed to provide admissible evidence, failed to provide Memorandum of Law, and the court file has no evidence which could be used by a jury to find for Defendants.

The District Court below has violated Local Rule 7.1 B. 3., and has not decided or afforded a hearing on Plaintiff's Motion for Summary Judgment in the required 10 day period.

Neither Plaintiff nor the Defendants have other remedy available for relief, therefore, it is in the best interest of justice for this Honorable Court to **grant** the Application for a Writ of Mandamus.

The entry of a Summary Judgment based upon default

and the failure to meet the burden of proper response to a Motion for Summary Judgment is as the matter of law and not of fact.

For the stated reasons, this application should be granted for a Writ of Mandamus, and Summary Judgment in Plaintiff's favor should be entered as a matter of law.

STATEMENT OF THE FACTS

OVERVIEW

Plaintiff's instant complaint was pending before the District Court one year during April of 1993, when Plaintiff moved for Summary Judgment under Rule 56, Federal Rules of Civil Proc. and Local Rules 7.1 and 7.5, (formerly Local Rule 10).

Defendants did not provide admissible evidence as required by Rules 56 and 7.5, failed to provide affidavits based upon personal knowledge, failed to provide Memorandum of Law, and therefore, Plaintiff is entitled to the entry

of Summary Judgment as a matter of law.

BACKGROUND OF FACTS

This action was commenced when Plaintiff's attorney filed a two-count complaint on May 9, 1990, which was amended on May 29, 1990, generally setting forth the same two counts.

In an order filed on September 6, 1991 the District Court dismissed count I, and during January of 1992 granted Plaintiff the right to amend his complaint, Plaintiff in pro se filed the First and Second Amended complaints, which were struck sua sponte on February 13, 1992.

Plaintiff then filed the instant **THIRD AMENDED COMPLAINT**, and also filed an appeal with this Court for a determination if the District Court's order was final and binding, and this Court ruled that the Order was **not final**, (See: 92-4091) which granted Plaintiff's right to reassert this cause of action, which is pending herein with out a

judicial blemish.

Defendants did not file a response to Plaintiff's Third Amended Complaint, but moved to strike or dismiss, based upon Rule 12, Federal Rules of Civil Procedures, and these motions are frivolous and pending.

Defendants failed in their **burden** under Rule 12 (e), which specifically requires: "The motion shall point out the defects complained of and the details desired.", which burden prevents the trial judge from becoming an attorney for the defendants, and therefore should not be considered herein.

Defendants also failed to convince the trial court of Rule 12 (f) violations to strike, and arguendo, even if the Court struck some redundant, immaterial, impertinent or scandalous matter, Plaintiff's Third Amended Complaint would still survive. Again, defendants failed to point out defects complained of.

Interestingly, defendants did not raise defenses of dispositive nature, failed to argue or provide opposition as to Plaintiff's RICO, ERISA 510 & 511, discharge in violation of the Constitutions First, Fifth and Fourteenth Amendments, therefore the entry of a Summary Judgment is proper.

The Third Amended Complaint alleges that Defendants violated Plaintiff's Constitutional rights under the First, Fifth and Fourteenth Amendments for allegedly failing to pay union dues under the Railway Labor Act, (2)11, and based upon this discharge also denied his pension rights in violation of the Employee Retirement Income Security Act, Sections 510 & 511, through fraud, conspiracy and RICO.

Plaintiff through "self-help" obtained the authorization for the deduction of his union dues, (**EXHIBIT 1**), which document was still in effect and in the files of Defendant Air Line Pilots Association, "ALPA", on January 13, 1993, and is prima facie evidence that Plaintiff could not be

discharged for his failure to pay union dues, since he complied and authorized the automatic deduction of his dues obligation.

Defendants could not argue against their "own" document, fresh from their own files, therefore, Defendants defaulted in their Rule 56 burden to provide admissible evidence, and continue to argue their out of time motions to dismiss and strike, motions which were filed during March and April of 1992, well over a year ago.

Plaintiff was a pilot employee of Eastern Airlines, Inc. from on or about February 11, 1963 continuously until his discharge on June 17, 1986, following his occupational accident on June 15, 1986.

Defendants paid large sums of money to a so called "Neutral Arbitrator" with out any legal right, and the Plaintiff has alleged that this payment of money is a bribe, it was paid to have the Plaintiff's discharge upheld in arbitration.

Plaintiff has also alleged that Defendants Pension Dispute Board members, two of which were high ranking officials of ALPA, had personal interest in denial of Plaintiff's ERISA rights, and one of the Eastern members first discharged Plaintiff, then as an ERISA fiduciary denied his ERISA pension.

STATEMENT OF THE ISSUES

The issue before the Court is solely based upon properly filed Motions for Summary Judgment under Rule 56, Fed.R.Civ.Proc. and Local Rules 7.5 and 7.1 Florida Rules of Federal Courts for the Southern District.

Plaintiff having met his burden in the proper filing of Motions for Summary Judgment, has the right to seek the entry of a summary judgment under Rule 56 (e), which very specifically sets Defendants burden in the required responses, making very clear that mere allegations and denials can not be considered by the Court, but Defendants **SHALL** file

admissible evidence of affidavits based upon personal knowledge, and since Defendants did NOT so respond, summary judgment shall be entered if appropriate See: CELOTEX CORP. V. CATRETT, 477 US 317; ANDERSON v. LIBERTY LOBBY, INC., 477 US 242 and ADICKERS v. KRESS & CO., 398 US 144.

Local Rule 7.5 spells out Defendants' duty in responding to Plaintiff's summary judgment in stating: "The papers opposing a motion for summary judgment shall include a memorandum of law, necessary affidavits, ... All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement."

Local Rule 7.1 C. provides for an independent right for the entry of these summary judgment motions since Defendants did not file Memorandum of Laws: "Failure to do so may be deemed sufficient cause for granting the mo-

tion by default."

Defendants response to Plaintiff's Motion for Summary Judgment is a platform to continue their arguments for their "out of time" and fully briefed motions to dismiss and strike, and claim a judicial preemption against Plaintiff's rights to the entry of the summary judgment based solely upon "judicial economy". This argument is a genuine hybrid, the denial of Plaintiff's rights based upon this argument would indeed be a landmark decision.

Defendants are attempting to insert their claim that Rule 56 does not apply in all circumstances and is subject to legal interpretations and delay. This of course is false, in fact the **1946 Amendment** specifically was drafted to provide a speedy and earlier motion for summary judgment.

Defendants have cleverly moved away from the sole purpose of a summary judgment under Rule 56 (a): "The very mission of a summary judgment procedure is to pierce

the pleadings and to assess the proof in order to see whether there is genuine issue for trial" See: **1963 Amendment**.

Defendants have not denied, and clearly can not deny that (1). Plaintiff was discharged for the non payment of union dues, an issue which the Supreme Court has established as protected by the Constitution's First, Fifth and Fourteenth Amendments, See: INTERNATIONAL ASSOCIATION OF MACHINIST et. al. v. S.B. STREET, 367 US 740 (1961); COMMUNICATIONS WORKERS OF AMERICA and its Locals 2100, 2101 v. HARRY E. BECK, Jr., et. al., 108 S.Ct. 2641 (1988).

Plaintiff's Motion for Summary Judgment is based upon EXHIBIT 1, which document protected Plaintiff's employment, and his discharge for the non payment of union dues violated his Constitutional protection under the First, Fifth and Fourteenth Amendments.

(2). Defendants have denied Plaintiff's ERISA pension

rights based **SOLELY** upon his discharge of employment for the non payment of union dues, violates ERISA Sections 510 and 511, which is an independent right to sue.

(3). Defendants' denial of earned medical coverage as provided to other Eastern former employees and retirees also is an independent cause of action.

(4). Defendant ALPA breached its duty of fair representation since Plaintiff was an Eastern employee, not only did ALPA breach its duty of fair representation in failing to protect Plaintiff's ERISA pension rights, ALPA's General Counsel, Gary Green became an attorney of record in the original complaint in which **ALPA WAS NOT A DEFENDANT**, and demonstrated to all concerned that Defendants Jack N. Mogus and Charles Copeland were acting in ALPA's behalf as high ranking ALPA officials on Defendant Pension Dispute Board, and not as fiduciaries who were neutral and serving Plaintiff's best interest.

(5). Defendant Travelers Insurance Corporation, to date, has refused to provide earned medical coverage to Plaintiff, when it has lost before the Workers' Compensation Board, and knows that Plaintiff was injured while an Eastern employee.

(6). Defendants individually, collectively are a continuing threat to Plaintiff, in over seven (7) years, Plaintiff has lost his employment, his vested ERISA pension, his earned medical coverage, he has been defamed as an employee who was discharged under the Railway Labor Act as a "free rider", an employee who failed to authorize or pay his union dues, and has suffered intentional emotional distress as a result of Defendants unlawful and tort actions, fraud, conspiracy.

(7). Defendants' unlawful action is a violation of the RICO statute, a continuing action following other RICO cases conducted Defendant ALPA. See: LANDRY V. AIR LINE PILOTS ASSOCIATION INTERNATIONAL, AFL-CIO,

901 F.2d 404 (5th Cir. 1990).

Defendants' motions for definitive statements are spacious and unreal, frivolous since Plaintiff's complaint **is not vague** or ambiguous that Defendants can not reasonably be required to frame an answer, and Plaintiff **did offer evidence** in support of legally recognized claims for relief, motion to dismiss must also be denied, motions to strike may not be favored, they should only be granted when defendant can not reasonably be expected to frame responsive pleading or to defend against those portions of complaint. See: FEDERAL DEPOSIT INS. CORP. v. WISE, 758 F.Supp. 1414 (D.Colo. 1991).

Based upon the foregoing legal standard, Plaintiff's instant cause of action is safe from Defendants' motions filed more than a year ago.

Defendants' default under Rule 56 is fatal to their cause.

RELIEF SOUGHT

Relief sought by Plaintiff is the entry of Summary Judgments against Defendants:

> EASTERN AIRLINES PILOTS RETIREMENT BOARD, ALAN C. GIBSON, WILLIAM R. TEGTMAN, JACK N. MOGUS, CHARLES COPELAND, and THE TRAVELERS INSURANCE CORPORATION.
>
> AIR LINE PILOTS ASSOCIATION.
>
> EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS and THE PENSION BENEFIT GUARANTY CORPORATION.
>
> EASTERN AIR LINES, INC. solely as Administrator of such defendant plan.

Plaintiff has a right to the entry of summary judgment since the court file has no admissible evidence which could be used by the jury to find for the Defendants, no genuine issue of material fact remains for trial.

Plaintiff has provided admissible evidence from the very files of Defendants, and under Rule 56(c) of the Federal

Rules of Civil Procedure, when the nonmoving party bears the burden of proof at trial, as in this cause, summary judgment is warranted if nonmovant fails to make a showing sufficient to establish the existence of an element essential to the nonmovant's case. See: NEBRASKA v. WYOMING, 123 L.Ed. 2d 317 at 323 (1993); CELOTEX CORP. v. CATRETT, 477 US 317, 322; ANDERSON v. LIBERTY LOBBY, Inc., 477 US 242, 248; MATSHUSHITA ELEC. IND. CO. v. ZENITH RADIO, 475 US 574.

Plaintiff seeking protection under the Constitutions First, Fifth and Fourteenth Amendments has the right to has his case construed to do substantial justice. See: CONLEY v. GIBSON, 355 US 41.

REASONS WHY WRIT IS SOUGHT

The District court has violated Local Rule 7.1 B. 3., an act which has denied all parties the timely resolution of this suit.

The applicable ten day period has passed, and the District Court has **not** issued an order, nor has the Court set the matter for hearing.

The Clerk of Court properly sent the Notification of 90 days Expiring and Ripeness for Hearing. (EXHIBITS 2 & 3).

Clearly, the sole remedy available to all parties in this action, is the granting of this Writ of Mandamus to decide this Motion for Summary Judgment.

Local Rule 7.1 B. 3 is mandatory upon the trial court: it [court] **SHALL**, (emphasis added) set the matter for rehearing within 10 days of receipt of the notification or shall issue an order resolving the motion or other matter during that same 10 day period.

Plaintiff's cause has been pending in the Court below for over three years; the Third Amended Complaint for over a year and a half with out a single order being entered with

the sole exception of one for expansion of time.

Plaintiff's instant cause is based upon his rights under the Constitutions First, Fifth and Fourteenth Amendments. While Plaintiff is not eligible for a speedy trial rule in a criminal case, certainly, Plaintiff has a "weighted" case based upon the due process clause of the Constitution's Fifth Amendment.

The circumstances justifying the issuance of this Writ is based also on the questions in law which Defendants raised as new and important issues of law of first sight and first impression in moving to strike a Motion for Summary Judgment.

A denial of Plaintiff's rights under Rule 56 and Local Rules 7.5 and 7.1 based upon Defendants motions to strike will cause Petitioner damages or prejudice which can not be corrected by a future appeal.

Petitioner's application for this Writ is timely, and is

proper even before an Order would be entered by the Court below, since the documented default by the Defendants in their failure to place admissible evidence before the Court under Rules 56, and failure to provide the Memorandum of law under Local Rule 7.1 C. provides the entry of the Summary Judgments in favor of the Petitioner-Plaintiff as a matter of law.

For the foregoing reasons the Court should **grant** this application and petition for a Writ of Mandamus and **enter** an Order granting the Summary Judgments in Petitioner's favor.

Respectfully submitted,

/s/

DANIEL G. GELLERT in pro se
P.O. 320370
Cocoa Beach, Florida 32932
(407 783-9412

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-1113-CIV-MOORE

DANIEL G. GELLERT,

Plaintiff,

vs.

EASTERN AIRLINES FIXED BENEFIT RETIREMENT INCOME PLAN FOR PILOTS, et. al.,

Defendants.
_____/

OMNIBUS ORDER ON PENDING MOTIONS

THIS CAUSE came before the Court upon the various pending motions in this action. The Court has considered the motion, the responses thereto, and the pertinent portions of the record, and accordingly, enters the following Omnibus Order on all pending motions.

I. MOTION TO DISMISS

Defendants William Tegtman and Alan Gibson sought dismissal of Plaintiff's action against them because of their status as members of the Railway Labor Act ("RLA") dispute board. Judge Federico A. Moreno previously dismissed Plaintiff's action, with prejudice, against several members of the RLA dispute board, i.e. Jack Mogus and Charles Copeland because of that same status. See Order of Judge Moreno, entered September 4, 1991 (citations omitted). Plaintiff alleges that Gibson and Tegtman were members of the RLA dispute board. See Fourth Amended Complaint at ¶¶ 15 and 16, respectfully. Accordingly, Defendants Tegtman and Gibson are dismissed from this action with prejudice consistent with the law of this case. Defendants' Motion to Dismiss (DE #123) is **GRANTED**.

II. MOTION TO STRIKE PLAINTIFF'S THIRD AND FOURTH AMENDED COMPLAINT

Through various motions, the Defendants have moved

to strike Plaintiff's Third and Fourth Amended Complaints. Defendants assert that the Third and Fourth Amended Complaints contain counts and named defendants previously dismissed by order of the Court, United States District Judge Federico A. Moreno. In that Order, Judge Moreno, sua sponte, struck Plaintiff's First Amended Complaint for its reference to previously dismissed counts and defendants. The Order granted Plaintiff leave to amend, specifically prohibited Plaintiff from naming dismissed defendants or referencing dismissed counts in his amended pleading. Accordingly, as Plaintiff's Third Amended Complaint asserts claims against defendants previously dismissed by Judge Moreno in violation of Court Order, Defendants' Motions to Strike the Third and Fourth Amended Complaints are **GRANTED IN PART**.[1] Plaintiff's Third Amended Complaint is **STRICKEN**. Defendants, however, shall respond

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[1] See Docket entries 130, 131, 133, 140, 155 and 169.

to the Fourth Amended Complaint, which does not include previously dismissed defendants, within thirty (30) days of the date of this Order.

III. MOTIONS TO STAY DISCOVERY

Defendants sought a stay of all discovery in this action pending resolution of the Motion to Strike the Third and Fourth Amended Complaints. As those motions are resolved, and no other basis for staying discovery exists, Defendants' Motions to Stay Discovery are **DENIED**. (DE ## 147, 154, 156 and 168).

IV. MOTIONS FOR DEFAULT

Plaintiff sought a default against Defendant Air Line Pilots Association for failure to respond to the Third and Fourth Amended Complaints. After consideration of Air Line Pilot's response, Plaintiff's Motion for Entry of Default is **DENIED**. (DE #137). Plaintiff also sought entry of defaults and default judgment against various defendants

while the Motions and Strike were pending. Accordingly, these motions are **DENIED**. (DE #216, 217, 218, 219, 225, 226, 227, and 228). Defendants' Motion to Strike Motion for Default is **DENIED AS MOOT**. (DE #224).

V. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff filed numerous motions for summary judgment during the pendency of the motions to strike the Third and Fourth Amended Complaints. Accordingly, Plaintiff's Motions for Summary Judgment based upon failure to respond to discovery or the Amended Complaints are **DENIED**. (DE ## 187, 190, 194, 198, 200, 201, 206, 207, 210, and 211). Plaintiff may file appropriate substantive motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure after completion of discovery and only upon leave of Court. Plaintiff's Motion for Hearing on Motions for Default and Summary Judgment is DENIED AS MOOT. (DE #191).

Defendants' Motions to Strike Plaintiff's Motions for Summary Judgment are **DENIED AS MOOT**. (DE ## 189, 195, 196, 199, 209, 215). Air Line Pilot's Motion to Stay Plaintiff's Amended Motion for Summary Judgment is **DENIED AS MOOT**. (DE #203).

VI. REMAINING MOTIONS

Plaintiff's Motion to Enforce Constitutional and Statutory Rights is **DENIED** (DE #177). Defendants' Motions to Strike Plaintiff's Motion to Enforce Constitutional and Statutory Rights are **DENIED AS MOOT**. (DE ## 178, 179);

Plaintiff's Motion for Recovery of Legal Fees is **DENIED WITHOUT PREJUDICE** to be renewed if Plaintiff ultimately prevails in this action (DE #182);

Plaintiff's Motion for Entry of Order for Interlocutory Appeal is **DENIED** (DE #167);

Defendant Air Line Pilot's Motion to Strike Plaintiff's Notice that Air Line Pilots are obstructing justice (DE

#171) is **GRANTED**;

Plaintiff's Motion for Protective Order (DE #172) is **DENIED**;

Plaintiff's Motion for Judicial Notice (DE #197) is **DENIED**;

Defendant Pension Benefit's Motion for Status Conference (DE #205) is **DENIED**;

Plaintiff's Motion for Injunctive Relief (DE #208) is **DENIED**;

Plaintiff's Motion to Add Exhibits to opposition to Motion to Strike (DE #214) is **GRANTED**; and

Any and all pending motions, other than those specifically listed here, are **DENIED AS MOOT**.

DONE AND ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida this 10th day of September, 1993.

/s/
K. MICHAEL MOORE
UNITED STATES DISTRICT
COURT JUDGE

cc:

Daniel Gellert, pro se
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4928

Filed Feb. 23, 1994

IN RE:

DANIEL G. GELLERT

Petitioner,

On Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Florida

Before: ANDERSON, COX and BLACK, Circuit Judges.

BY THE COURT:

Petitioner's application for a writ of mandamus is denied because petitioner has an adequate remedy by appeal.

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

February 23, 1994

Daniel G. Gellert
P.O. Box 320370
Cocoa Beach, Florida 32932

RE: 93-4928 In Re: Gellert, Daniel G.
DIST. CT. No.: 90-01113-CIV-KMM

The enclosed certified copy of this Court's Order denying the petition for writ of mandamus is issued in lieu of the mandate of this court.

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,

MIGUEL J. CORTEZ, Clerk

BY: JOHN W. FlOYD
Deputy Clerk (404) 331-3833

Encl.

DIS-4 (6/92)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4928

Filed July 8, 1994

IN RE:

DANIEL G. GELLERT

Petitioner,

On Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Florida

BEFORE: ANDERSON, COX and Black, Circuit Judges.

BY THE COURT

Petitioner's "Suggestion of Rehearing In Banc," treated as a motion for reconsideration of this Court's order dated February 23, 1994, denying his petition for writ of mandamus is denied.